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No. 12507

2632

United States
Court of Appeals
For the Ninth Circuit.

HEINRICH ROEDEL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court
Northern District of California,
Southern Division.

FILED

MAY 23 1950

PAUL P. O'BRIEN,

No. 12507

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

MR. HEINRICH ROEDEL,

Box 651—P.M.B.

Alcatraz, California,

In Propria Persona.

MR. FRANK J. HENNESSY,

United States Attorney,

Northern District of California,

Post Office Building,

San Francisco, California,

Attorney for Plaintiff and Appellee.

In the Southern Division of the United States
District Court for the Northern District of
California

Cr. No. 27792-S

HEINRICH ROEDEL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR VACATION OF THE JUDG-
MENT AND SENTENCE AND TO QUASH
THE VERDICT

The Verified Motion of Heinrich Roedel for vacation of the judgment and sentence and for quashing of the verdict respectfully shows this Honorable Court that:

I.

Your petitioner is unlawfully restrained of his liberty by E. B. Swope, Warden of the United States Penitentiary at Alcatraz, California; the body of your petitioner, the said E. B. Swope and the said United States Penitentiary at Alcatraz, California, are all, and each of them, within and subject to process issued from out of and under the authority of this Honorable Court.

II.

Jurisdiction

Petitioner is entitled to file this motion under the authority of and in conformity with the provisions contained in the New Title 28 U.S.C. Section 2255—effective September 1, 1948, which provides:

“A prisoner in custody under sentence of a Court of the United States claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the Court which imposed the sentence to vacate, set aside or correct the Sentence.”

A motion for such relief may be made at any time.

“Unless the motion and the files and records of the Case Conclusively show that the prisoner is entitled to no relief, the Court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there Has been such a denial or infringement of the Constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack,

the Court shall vacate and set the judgment aside and shall discharge the prisoner or re-sentence him or grant a new trial or correct the sentence as may appear appropriate.” (Emphasis Supplied.)

III.

Facts Involved

On July 29, 1942, petitioner was arrested by the Federal Bureau of Investigation and later accused of setting a match off at Hopeman Brothers, Inc. Warehouse. It is alleged that petitioner was held in custody at the Alameda County Jail and on August 20, 1942, he was interviewed by an agent of the Federal Bureau of Investigation, to wit, a one Robert H. Moran. The record discloses that no evidence was introduced showing that a crime had been committed in that the only witness was William H. Green, who testified that petitioner struck a match. Petitioner alleges that he is innocent of being present in the Warehouse and that the only knowledge of such events on his part is taken from the actual facts presented at the trial.

On November 25, 1942, a Federal Grand Jury returned and presented a true bill by an indictment charging that petitioner did, on or about July 28, 1942, at the premises known as Hopeman Brothers, Inc. Warehouse, Richmond Shipyard No. 2, Richmond, California, and within the Southern Division of the Northern District of California, said defendant then and there being, did, the United States then being at war, with intent to interfere with and

obstruct the United States in carrying on the War, wilfully, knowingly and feloniously attempt to injure said premises, which were and are buildings where war material was and is being produced and manufactured, by attempting to set fire to the same.

On November 27, 1942, petitioner was arraigned and entered his plea of not guilty to the charge hereinabove set forth and, that a one Mr. James B. O'Connor an attorney at law was appointed to defend petitioner, the case was continued until December 8, 1942.

On December 15, 1942, the case was tried before a jury and on December 19, 1942, petitioner was duly convicted and sentenced for a term of thirty (30) years.

An appeal was prosecuted to the United States Circuit Court of Appeals for the Ninth Circuit and the judgment of conviction was affirmed in *Roedel v. United States*, 9 Cir., F. (2).

Petitioner avers and alleges that his attorney advised him that he had ninety (90) days in which to apply for writ of certiorari in the Supreme Court of the United States. That after a period of thirty days had expired his attorney advised him that it was then too late in that the federal rules of Criminal procedure provided for a petition to be filed with the Clerk of the Supreme Court within thirty days from entry of judgment by the Court of Appeals and, that by reasons of his counsel's misrepresentation of the law to petitioner, he was deprived of the right to file for Writ of Certiorari in the Supreme Court which was a denial of the due process of law

he was entitled to by the Fifth Amendment to the United States Constitution, in that:

IV.

Petitioner's Contentions

(1) It is the contention of the petitioner and he alleges that the said indictment did not inform him of the nature and cause of the accusation that he was entitled to under the Fifth and Sixth Amendments to the United States Constitution, in that:

(A) The indictment omitted the pile of lumber that was alleged to have been the subject of the testimony as given by the Government's witness "Green," and:

(b) There was no evidence to establish the corpus delicti in that such evidence failed to disclose that there had been an attempt to set fire to the buildings charged in the indictment.

(2) It is the contentions of the petitioner and he alleges that the judgment and sentence is void in that the indictment failed to charge the essential facts necessary to constitute a valid indictment, in that:

(a) The evidence introduced clearly showed that some one struck a match while standing by a pile of lumber, and:

(b) Petitioner was informed by the indictment that he was accused of setting fire to buildings.

It is therefore contended and alleged that the evidence was insufficient to convict him, in that, the indictment failed to inform him of the nature and cause of the accusation and, that the failure of the evidence to establish the corpus delicti rendered the

proceedings void ab initio, and the judgment and sentence should be vacated, set aside, and for naught held, and the verdict of the jury quashed, in that:

V.

The Indictment Failed to Inform Petitioner of the
Nature and Cause of the Accusation

Point One

The evidence before the Grand Jury disclosed that a man was seen lighting a match while he stood by a large pile of kiln dried lumber. The indictment in the case at bar does not charge that petitioner attempted to set fire to the lumber, i.e., the indictment charges that petitioner attempted set to buildings where war material was and had been in production. A newspaper article showing petitioner's claim to be true is annexed hereto, designated petitioner's Exhibit A, and by reference made a part hereof as though fully incorporated herein at length.

If the indictment fails to charge that petitioner attempted set fire to the pile of lumber, see exhibit A, then no offense against the laws of the United States was charged by the indictment. The indictment as returned by the Grand Jury reads in words and figures, to wit:

"In the November 1942 term of said Division of said District Court, the Grand Jurors on their oaths presents: That

Heinrich Roedel

(hereinafter called said defendant), on or about July 28, 1942, at the premises known as Hopeman

Brothers, Inc. Warehouse, Richmond Shipyard No. 2, Richmond, California, and within the Southern Division of the Northern District of California, said defendant then and there being, did, the United States then being at war, with intent to interfere with and obstruct the United States in carrying on the War, wilfully, knowingly and feloniously attempt to injure said premises, which were and are buildings where war material was and is being produced and manufactured, by attempting to set fire to the same.

Approved as to Form:

W. E. L.

FRANK J. HENNESSY,

United States Attorney.

(Endorsed)

A true bill, Emil E. Engels, Foreman. Presented in Open Court and Ordered Filed Nov. 25, 1942.

WALTER B. MALING,

Clerk,

By J. P. WALSH,

Deputy Clerk.

The indictment charges that petitioner attempted to set fire to buildings where war material was being produced and manufactured. There was no such evidence before the Grand Jury and none before this Court. The statute upon which the indictment is based makes it a crime to attempt to injure or destroy, any war material, war premises, or war utilities. 50 U.S.C.A. Section 102. The indictment

fails to charge a crime in that the corpus delicti is not established by the evidence, (a) because there was no overt act to make the crime complete, and (b) the evidence shows that no attempt was made to set fire to the alleged buildings charged in the indictment. The fact that someone struck a match does not make it a criminal offense even in a war plant, where, as here, the building where the pile of lumber was located did not belong to the United States. The building in question "Hopeman Brothers, Inc. Warehouse" does not belong to the Richmond Shipyard No. 2, in that, "Exhibit A" clearly shows that the Warehouse belonged to a subcontractor. The indictment to charge an offense (50 U.S.C.A. Section 102) must charge an overt act to complete the crime. The material stored in "Hopeman Brothers, Inc. Warehouse" was not material being produced or manufactured as stated in the indictment. Quoting from petitioner's "Exhibit A":

"Police declare that the pile of lumber is not the property of the shipyard proper but belonged to a subcontractor."*

Petitioner urges that the indictment fails to spell out the elements of the offense under (50 U.S.C.A. Section 102), in that:

"When the fact which is made by the statute an essential element of the crime is a collective or general one, it is necessary to specify the particular thing intended to be charged." and, "... the offense must be directly charged, and cannot be made out by inference or implication."* (McKenna v. U. S.,

6 Cir., 127 F. 2d 88.)

In the case at bar this Honorable Court will note that the indictment fails to allege the essential fact that an attempt was made to set fire to the lumber pile in question (see Exhibit A) and therefore did not charge a crime against the laws of the United States. As was said in *Grimsley v. United States*, 5 Cir., 50 F. (2d) 509, that:

“The opinion of the majority is an extremely simple and, as I think, correct statement of the principle that two substantial things must concur before a defendant may be convicted of a felony in a Court of the United States; (1) He must be charged by indictment with the commission of a federal offense; (2) the offense must be proven against him.

I have always supposed that an indictment without proof cannot support a conviction, so proof without indictment cannot.”*

The same rule is laid down by the United States Court of Appeals for the Ninth Circuit in *Peters v. United States*, 9 Cir., 94 F. 127, therein the Court held that:

“Every indictment should charge the crime, which is alleged to have been committed, with precision and certainty, and every ingredient thereof should be accurately and clearly stated * * *.” (Citing numerous cases.)

The only evidence here as shown by the record proper was a statement made by one of the Government witnesses that some one struck a match. The

striking of a match does not constitute a crime against the laws of the United States regardless of the place where the match is struck. Assuming that a man be guilty of striking a match in an area where smoking is prohibited, "does it not take more than an intent to make a crime cognizable under the laws of the United States"? The indictment in the case at bar alleges that petitioner attempted to set fire to certain buildings, to wit, premises known as Hopeman Brothers Inc. Warehouse, Richmond, California. The evidence discloses that a match was struck (See Record Page 78) and that the watchman said "No smoking" but his testimony was so conflicting that it should have been disregarded. If the evidence reveals that only a match was struck it is obvious that there was no attempt to set fire to the alleged lumber pile in that the statute (50 U.S.C.A. Section 102) makes it a crime for any person that attempts to injure and etc. In the case at bar the evidence does not disclose such an attempt and the indictment fails to allege that petitioner attempted to set fire to the pile of lumber in question, that is to say, the pile of lumber is essential to the indictment to establish the corpus delicti and it would follow that the omission is one of substance and the indictment amounts to nothing. The wording of the indictment fails to disclose that there was an attempt to set fire to the pile of lumber in question. In the case of *Fasule v. United States*, 272 U.S. 622, the Supreme Court of the United States held:

"It is not permissible for the Court to search for

an intention that the words themselves do not suggest. *United States v. Viltburger*, 5 L. Ed. 37. And before one can be punished it must be shown that his case is plainly within the statutes. *United States v. Lacher*, 134 U.S. 624."

Petitioner finds the same rule laid down in *United v. Cook*, 17 Wall 174, therein the Supreme Court held:

"Every ingredient of which the offense is composed must be accurately and clearly alleged."

And in the Text Books the rule requires that

"The failure to properly allege any material fact or circumstances necessary to constitute the crime charged is a fatal defect, and such omission cannot be supplied by a charge that the act was committed 'Contrary to the law' 'or unlawfully,' etc."

(Citing Cases.)

(42 C.J.S., page 1022, Section 130.)

In the case at bar the indictment fails to charge that petitioner committed any overt act in that the pile of lumber in question was omitted from the indictment and there was no proof that would sustain that petitioner attempted to set fire to certain buildings. In the case at bar the only evidence was upon a theory that a match was struck which was insufficient to sustain a conviction. As was said in *Grimsley v. United States*, 5 Cir., *supra*, that:

"No case has yet been found by me which declares that failure to charge the essential element of an offense is a mere technicality; on the contrary, there

is general concurrence in the statement that if "the indictment fails to state the facts sufficient to constitute the crime charged, the judgment of conviction cannot, of course, be sustained." *Sonnenberg v. United States*, (C.C.A.) 264 F. 327, 338; *Wong Tai v. U.S.* 273 U.S. 80, 47 S. Ct. 300, 71 L. Ed. 545; *Wishart, v. U.S.* (C.C.A.) 29 F. (2d) 103, 106; *Shilter v. U.S.* (C.C.A.) 257 F. 724, and this even in the absent of an attack of any kind upon the indictment in the Court below." *Sonnenberg v. U.S.*, (C.C.A.) 264 F. 327, 328."

Petitioner respectfully urges here that the indictment is based upon an incident that never happened. The only evidence possible for taking the matter before a grand jury was the striking of a match near a lumber pile which does not make a complete crime. In this respect petitioner cites this Honorable Court to *Blackstone Commentaries*, P. 21, therein it is held:

"To make a complete crime cognizable by human laws, there must be both a will and an act. * * * In all tempered jurisdiction, an overt act, or some open evidence of an intended crime is necessary in order to demonstrate the depravity of the will before the man is liable to punishment. And, as a vicious will without a vicious act is no crime, So on the other hand, an unwarranted act without a vicious will, is no crime at all. So that to constitute a crime against human laws, there must be first, a vicious will; and second an unlawful act consequent upon such vicious will.'"

It is respectfully urged that in the case at bar the indictment attempts to charge an innocent man with a crime that was never committed. How can this Honorable Court say that there was an attempt to set fire to the buildings where, as here, the fire would have to be set to the lumber pile before it could have spread to the warehouse buildings and, since no fire was ever started there was no attempt to injure the buildings where war material was being stored. This is proven by petitioner's "Exhibit A" therein it clearly appears that:

"Police declare that the pile of lumber is not the property of the shipyard proper but belonged to a subcontractor, but police doubt that it could have caused much damage to the main shipyard structures." (Emphasis supplied.)

Petitioner therefore urges that since the pile of lumber in question was essential to the charge in the indictment that such omission was one of substance and rendered the indictment void on its face. In the case of *United States v. Crummer*, 10 Cir., 151 F. (2d) 958, the Court held that:

"The Sixth Amendment to the Constitution of the United States provides among other things that in all criminal prosecutions, the accused shall be informed of the nature and cause of the accusation. And by settled rules of criminal pleadings, a defendant is informed of the nature and cause of the accusation against him if the indictment charges all of the essential elements of the offense with sufficient completeness and clarity to apprise him of the crime

charged with such reasonable certainty as will enable him to make his defense and to plead the judgment of acquittal or conviction in bar to a future prosecution for the same offense. *Evans v. United States*, 153, U.S. 584, 14 S. Ct. 934, 38 L. Ed. 830; *Cochran and Sayre v. United States*, 157 U.S. 286, 15 S. Ct. 628, 39 L. Ed. 704; *Rosen v. United States*, 161 U.S. 29, 16 S. Ct. 434, 480, 40 L. Ed. 606; *Burton v. United States*, 202 U.S. 344, 26 S. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 362; *Bartell v. United States*, 227 U.S. 427, 33 S. Ct. 383, 57 L. Ed. 583; *United States v. Brehрман*, 258 U.S. 280, 42 S. Ct. 303, 66 L. Ed. 619; *Wong Tai v. United States*, 273 U.S. 77, 47 S. Ct. 300, 71 L. Ed. 545; *Hagner v. United States*, 285 U.S. 427, 52 S. Ct. 417, 76 L. Ed. 861; *Butler v. United States*, 10 Cir., 53 F. (2d) 800; *Weber v. United States*, 10 Cir., 80 F. (2d) 687; *Crapo v. United States*, 10 Cir., 100 F. (2d) 996; *Graham v. United States*, 10 Cir., 120 F. (2d) 543; *Travis v. United States*, 10 Cir., 123 F. (2d) 268; *Rose v. United States*, 10 Cir., 128 F. (2d) 622, *Certiorari denied* 317 U.S. 651, 63 S. Ct. 47, 87 L. Ed. 524; *United States v. Armour & Co.*, 10 Cir., 137 F. (2d) 269."

The Court goes on to say:

"Where a statute creating an offense sets forth fully, directly, and expressly all of the essential elements necessary to constitute the crime intended to be punished, it is sufficient if the indictment charges the offense in the words of the statute. But

where the statute is in general terms and does not set out expressly and with certainty all of the elements necessary to constitute the offense, the indictment must descend to particulars and charge every *constituent* ingredient of which the crime is composed.*¹ United States v. Cruikshank, 92 U.S. 542, 23 L. Ed. 588; United States v. Carll, 105, U.S. 611, 26 L. Ed. 1135; United States v. Hess, 124 U.S. 483, 8 S. Ct. 571, 31 L. Ed. 516; Blitz v. United States, 153 U.S. 308, 14 S. Ct. 924, 38 L. Ed. 725; Pettibone v. United States, 148 U.S. 197, 13 S. Ct. 542, 37 L. Ed. 419; Keck v. United States, 172 U.S. 434, 19 S. Ct. 254, 43 L. Ed. 505; Armour Packing Co. v. United States, 209 U.S. 56, 28 S. Ct. 428, 52 L. Ed. 681.”

In the case at bar this Honorable Court will note that the indictment charges one thing and the evidence disclosed that something else happened. The statute is in general terms and for reason stated in United States v. Crummer, *supra*, see footnote *infra*, the indictment failed to descend to particulars and charge the pile of lumber in question which was essential to the offense.

In the case of Oesting v. United States, 234, F. 304, therein the Court held that:

“By counsel’s failure to demur to the indictment, or to move to quash or in arrest of judgment after

*¹The evidence disclosed that some one struck a match but failed to disclose that there had been an attempt to set fire to the buildings charged in the indictment.

verdict, he waives his right to object in an appellate Court to any matter going to the form in which the offense is stated, but he does not waive his right to raise objections that the indictment is lacking in some essential element to constitute the offense which is charged.” (Emphasis supplied.)

Petitioner therefore urges that the indictment is bad in failing to charge the pile of lumber in question and that since the evidence failed to establish the corpus delicti that the Court was without jurisdiction and the judgment of conviction is void, in that:

VI.

Point Two

The Evidence was Insufficient to Convict Petitioner

It is respectfully urged that the only evidence before the jury was that of William H. Green the night watchman from Richmond Shipyard No. 2 and the Government admitted such evidence was insufficient:

Mr. Licking: No questions. If the Court please, I have no more witnesses; the Government closes at this time. I would like, however, with the understanding, of course, that if the evidence at this time is deemed insufficient we might have an opportunity of calling a further witness, which would not have any effect upon any rights the defendant has at this time.” (R. 91.)

Petitioner respectfully submits the testimony of William H. Green which appears in the transcript of record in Roedel V. United States, No. 10,435,

and urges that this Honorable Court order admitted into evidence the whole of the testimony of the aforesaid William H. Green, in that, deleted testimony of the said William H. Green will clearly show that he committed perjury on the witness stand. The following testimony of William H. Green appears from the record:

William H. Green, called as a witness for the United States, having been first duly sworn, testified substantially as follows:

My name is William H. Green. I am 51 years of age. At the present time I am employed in maintenance at Richmond Shipyard No. 2. The early morning of July 28, 1942, I was employed as a police guard at Richmond Shipyard, which include the premises known as Hopeman Bros. Warehouse. On that evening I had occasion to see and encounter the defendant whom I now identify as being seated in the Court room. I first saw him about 1:45 of the morning of July 28. He was under a pile of lumber opposite the passage through the Warehouse from the east side to the west side. That would be in the north end. I came in the warehouse through the southeast door, crossed to the aisle to the southwest door and then up the aisle. Here is the door that I entered the Warehouse—(indicating on the diagram.) I crossed from the southeast door to the southwest door. The place where I entered is where you have the mark G-1 on the diagram. From the southwest door, that is the mark G-2 on the diagram, I went to the northwest door at the end

of the building which you marked G-3 on the diagram. I then went back to the northeast door retracing my steps. From the north door I went back to the southeast door. From there I went towards the northwest door. From the northwest door I started towards the northeast door. As I got right in here (indicating) where there is a pile of lumber, I heard the click of a match being lit. That would be along here on this aisle which you mark G-4. As I got there I heard the click of a match and I turned my head to the right and I saw the defendant. He had the match in his hand striking it. I said to him, "No smoking." As I made that remark, his right hand went to his pocket and out came a gun. (His hand was in this position); when I dove right into him I was about 4 feet from him at the time. I would be in this position on my hands and knees (indicating). His hand went to his right pocket. That was after I heard the flash of a match. I was coming toward him and when I got where I heard the click and I turned and said, "No smoking," and his right hand went to his pocket and he came out with a gun. He had the gun in this position (indicating), and I just fell sideways into his arm and knocked the gun out of his hand. I caught his arm under me and he was on top of me. The gun was lying on the left of both of us. I grasped his arm and hand and he fell on top of me. We wrestled on the floor both of us trying to get the gun. Once I shoved the gun further away. I didn't want him to get hold of it and I didn't want to very badly myself. The gun was lying right out opposite my head.

I later pointed out to Agent Moran the point where this struggle occurred and at that time photographs were taken of the various localities. I recall the locality which is depicted in Government's Exhibit No. 1 for Identification. That was practically the place where he was kneeling down and where the material was that he was attempting set afire.*¹ Government's Exhibit No. 3 for Identification indicates the point right opposite where the struggle between the two of us occurred. Government's Exhibit No. 4 for Identification is the spot where the struggle between the two of us took place and also where the oakum was placed amongst the lumber. Government's Exhibit No. 5 for Identification shows the window that was broken by the stick that was thrown at me. Government's Exhibit No. 7 For Identification depicts the center aisle down through the lower floor of the warehouse. These pictures indicate the same situation that existed the next morning when Agent Moran was there and interviewed me. At that time I pointed out these situations to Agent Moran.

Whereupon Government's Exhibits Nos. 1 to 7 For Identification were offered and received in evidence.

During the struggle I shoved the gun, or rather hit it with the point of my hand, and shoved it farther out and he kept jerking on me with his arm under me, but I had hold of his arm until we got

*¹ In the beginning Green testified that the first time he seen the petitioner that petitioner was down under the pile of lumber; note above his charge that petitioner was on one knee by the lumber.

out from under the pile of lumber, then we broke loose and I started toward the northeast door. I was trying to get away from him. He followed and I had gotten about the point where the pile of lumber comes up the aisle leading from the northeast door to the southeast door, he reached down and he picked up this body stake and he drew back and let the stake drive at me. It went over my head and hit the window. At that time I broke loose and ran through from the southeast door to the southwest door and down to the sub-station where I called the guards. Government's Exhibit 11 For Identification, which you show me, is the stake that I refer to. It was lying on top of the pile of steel where it hit the window.

Whereupon, Government's Exhibit No. 11 was offered and received in evidence.

The place that you mark G-6 on the map is the location of the window that the stake struck. Government's Exhibit No. 5 shows the broken window where the stake hit. This is a picture of me pointing to the spot where the stake hit. I reported the incident to the yard police. I gave a description of my assailant to the agent of the F.B.I. as soon as they came out there. They got there I should judge, around 3:00 o'clock in the morning, between 2:30 and 3:00. I was a little nervous at that time. Physically I was O.K. after this incident outside of my arm was twisted a little. I went to the first aid station. My clothing was pretty much mussed up.

It was dirty from material picked up during the struggle.

The first time I saw the defendant he was 4 feet from me. When Mr. Moran came I went over the situation with him. Before Mr. Moran came I went back to the building with the captain of the guard and went to the place where I first saw the defendant. Then I noticed that the oakum was piled under the lumber, that is, the oakum that is shown in Government's Exhibit No. 1. I also at that time visited the locality of the window where I heard the crash. I noticed the window was broken and found the stake there which is Government's Exhibit No. 5 For Identification. Government's Exhibit No. 4 For Identification which you show me, depicts the condition of the lumber at the place where the oakum was found. There is about 4 feet from the floor as you are standing there where the lumber goes over and the aisle extends back about 8 or 10 feet. It extends (indicating on Government's Exhibit No. 4) back here and from this pile of lumber here out to this aisle would be around 12 or 14 feet. Oakum is also kept at the south end of the building in one corner. There is little supply shop or office in that corner. Hopeman Bros. Warehouse was merely being used for storage. I have never, during my visits there, seen oakum being used in or around the lumber. It is kept separately by itself. Employees come in and out of the warehouse. I was supposed to keep those out who were not employed by Hopeman Bros. Others who had no business there came in there also.

After this occurrence on the early morning of the 28th I next saw the defendant three or four days later at the Oakland City Jail. I do not remember just how soon it was afterwards Mr. Moran took me in to look at him. He only took me there on one occasion. Before I went there I had been shown by Mr. Moran a number of photographs. I don't know how many there were. There were quite a number of them and looking through them I ran across the photograph and said I would like to take a look at the man in person.

Government's Exhibit 8(a) For Identification which you show me is a similar photograph to the one that was exhibited to me.

Whereupon Government's Exhibit 8(a) For Identification was offered and received in evidence.

Government's Exhibit 8 was shown to me with the other photographs and I picked it out from amongst the number of photographs that were shown me. When Mr. Moran arrived there at Hopeman Bros., there was a quantity of oakum still in the place as shown in Government's Exhibit No. 1 which Mr. Moran took charge of.

Whereupon, Government's Exhibit No. 12 For Identification was offered and received in evidence.

At the time that I had the struggle with this man he had on a brown jacket with leather on it. I am not sure just what color his trousers were. He had no hat on. I believe that his shoes were dark. I believe at the time that he wore dark shoes. I did not notice whether they were low cut or high cut. I

later saw the defendant and identified him at the Oakland City Jail.*² Mr. Moran was with me. Mr. Moran was with the defendant in a room and I was outside. Mr. Moran caused the defendant to assume different positions for my benefit and directed me to observe him. At the time that Government's Exhibit 8 was exhibited to me I identified the defendant from the picture. I do not remember how the defendant was dressed the day I identified him in the jail at the Court House building in Oakland. Government's Exhibit 9(a) which you show me is the same jacket that the defendant wore when I saw him at Hopeman Bros., and the defendant is the person with whom I had the tussle that evening and the person whom I saw with the lighted match near the oakum.

Cross-Examination

The last time I saw the jacket which you show me was on the morning of July 28, I recall now, I believe, that I saw it at Angel Island when I went over there to identify the defendant the second time. My best recollection is that while we were at Angel Island Mr. Moran had the jacket and showed it to

*²Witness Green was brought to the Oakland City Jail by Mr. Moran and instead of placing the defendant with a group of other persons for the purpose of allowing Green to identify the defendant, Mr. Moran confined defendant to a section where Green could observe the defendant in different positions, which method of identifying defendant violates all ethics and principles of law. (See Transcript of Record Pages 29-30.)

us. Mr. Moran had it in his possession at Angel Island before I saw the defendant that day. He showed me the trousers, or ones similar to them, but I never was positive about the trousers he had on. He showed us two pairs of trousers and the jacket at Angel Island. I do not recall how the defendant was dressed when I saw him in the county jail because I was looking through a little hole right at his features or his face and I did not pay any particular attention to the type or color of clothes he had on that day. When I saw him at Angel Island he had on rough clothes but I do not recall what color. He had a shirt on. He did not have a jacket on that day. I have not been shown a full leather jacket that is supposed to have been worn by the defendant. I said in my first identification of him that he wore a jacket containing leather in it, not a full leather jacket.

On the morning of this occurrence I made a written report to my employers in which I gave a description of the man who assailed me. I do not know where that original report is nor do I have it with me. The report was made to the police department.

I first saw Mr. Moran the morning of the occurrence. The next time I saw him in connection with this investigation was a day or two after the occurrence. I am not absolutely certain whether it was the second, third or fourth day that Moran got in *touch me* and asked me to go to the city jail with him that he asked me to identify or try to identify

the defendant. I have no recollection whether it was one, two or three days. My best recollection is *that was* two or three days, or two, three or four days after the incident; I don't know whether it was a week later or not. I know it wasn't two weeks later. I could have been within ten days. I said it was on the second, third or fourth day. If Mr. Moran testified that it was a month later, I don't think Mr. Moran could have been mistaken. In my mind it was the second, third or fourth day.

Mr. Moran exhibited a number of photographs to me out of which I picked a photograph of the defendant. I would say that he showed me between 100 and 150 photographs. I do not recall just when it was but it was before we went to the Alameda County jail and about two, three or four days after the incident. He showed me all the photographs at one time, including Government's Exhibit 8(a) and I went through all of them and picked that one out as the one that resembled my assailant. I do not recall Mr. Moran showing me Government's Exhibit 8(a) alone. If Mr. Moran testified that he showed Government's Exhibit 8(a) alone, I would not say that he was mistaken. If he said he showed me this single photograph of the defendant alone and the next day he took me to the Alameda County Jail to show me the defendant, I would not say that he was mistaken, but I don't recall him showing me any one single photograph. I know that the photograph I picked out was among the ones that he showed me I don't recall when it was that I picked this one out.

I don't recall whether it was a week or a month afterwards, nor do I recall the number that he showed me at that time. I didn't count them, but I am as positively certain about my identification of the defendant as I am about the number of photographs that were shown me. I am positive of my identification but I am not positive of the number of photographs that I was shown. I became positive of my identification the day I saw the defendant in the Alameda County Jail. When shown the photograph I made the statement that I would like to take a look at the man in the photograph. That is, I had picked the photograph out from a number without any assistance from Mr. Moran, fingerprinting department at the shipyard.*³ They were handed to me and I was asked to look through them. Moran asked me to look through them for the purpose of picking out one that resembled my assailant, and I said I would like to get a look at the man in the picture. Moran did not tell me who the man was nor whether or not he was in custody. I told him the picture was very similar to the man I had the tussle with in the warehouse. At the time I picked out the photograph I did not say whether or not he was the man that I had the struggle with. There wasn't any doubt in my mind when I picked out the photograph. I just stated that I would like to get a look at him. When I made the request for a view of the man whose picture I had picked out I was not certain that the man in the picture was my assailant. The picture was very similar to the man sitting there

(indicating the defendant in Court). My state of mind at the time the picture was shown to me was that the person depicted was very similar to my assailant.*³)

On the morning of this incident during the struggle a gun was exhibited. I was not armed at that time. The gun that was exhibited was an automatic pistol. I am familiar with firearms having had thirty years experience with them. The gun looked like a Remington Automatic. It appeared very close to a 38 Colt automatic. I would say it was a Colt. I last saw the revolver when I got it from under my assailant when it was lying under the pile of lumber.*⁴) We both got up together and at that time the gun was still on the floor. I then backed out from the warehouse facing the assailant, he moving up towards me all the time, and then he picked up the stake and threw it. I walked out of the warehouse down to the substation and called the guards. I do not know what my assailant did. I returned from the sub-station with the Captain of the guards and some men to whom I related the things that had happened. We went

*³) It is obvious that fingerprints were taken but failed to prove to be those of the defendant's and were therefore not made known at the time of trial. No doubt whoever the man was that struck a match near the pile of lumber left fingerprints. Also the stick which Mr. Green claims was hurled at him by the same man, after, or during the struggle, and which he Mr. Green turned over to the investigating officers. One may well ask what did the fingerprints show.

back to the place where the struggle occurred and were standing there when we noticed the oakum stuck back under. That was the first time that I had seen the oakum. We looked for the gun right after we came back but did not find it. When I got up there the glass was broken I looked for and found the stake on the top of a pile of steel.*4)

I went over to Angel Island because I was asked to do so by Mr. Moran to take a look at the defendant. I had already seen him and identified him. It was October when I went to Angel Island with Mr. Moran and Mr. Kaylor. Moran wanted me to take a look at the defendant again. Prior to the time I went to Angel Island I did not know Mr. Kaylor. I had seen him. I knew he was a taxicab driver. When I went to Angel Island I went into the room where they had the defendant. Mr. Moran was there. No one else was there. The defendant was sitting down when I went in there was no conversation between us. I took a look at him and said, "this is him." I believe that I said when I went in to Moran that I believed this is the man that I had accosted in the Warehouse. Mr. Moran did not say anything. The defendant started a

*4) Green testified that the gun was under the defendant and defendant was under the pile of lumber and that he got the gun from under the defendant. However, Green by his own testimony refutes his own statement that he got the gun from under the defendant, in that, he states (R. 86), that "we got up together and at that time the gun was still on the floor."

cussword at me and jumped out of the chair he was sitting in. I think he said I was a dirty liar or a damned liar, or called me a liar or something similar to that. I have no recollection of the type of shoes the person had on the morning of the assault. He was down on one knee and went up and I did not pay any particular attention to the shoes. I do not recall any statement between Moran and the defendant at Angel Island regarding his shoes. I left the room right after the defendant called me a liar.

Redirèct Examination

The first time I saw Government's Exhibit 8 I stated that the picture was similar to the defendant. I made only one trip to the Oakland City Jail to see the defendant and it was shortly after I had been shown the picture. I do not recall whether I was shown this picture once and I picked that picture as one resembling the defendant. I am confident that the defendant on trial is the man with whom I had the struggle on July 28.

Petitioner respectfully urges that the above testimony of William H. Green is the testimony settled by the bill of exceptions and does not show the whole of the testimony. William H. Green in the beginning testified that the first time he seen the petitioner that petitioner was under a pile of lumber. Later he testified that petitioner was down on one knee at the time they struggled in the Warehouse. Under the above testimony an innocent man was convicted and sentenced for a term of thirty

years, in that, there is no evidence of proof that any one had committed any crime against the laws of the United States. The fact that petitioner was a German prejudiced him with the jury and though innocent he was convicted because no other person could be found by the F. B. I. that would fit the case so perfectly as the petitioner. William H. Green was not telling the Court the truth about the first time he seen petitioner because the facts are that the Witness, William H. Green, was taken to the Alameda County Jail by Robert H. Moran, an agent of the Federal Bureau of Investigation, and told to identify the petitioner. It is therefore urged that the testimony of Witness Green showed that a match was struck but it does not show that a crime was intended or attempted by anyone. The striking of the match did not establish the *corpus delicti*. In Underhill's Criminal Evidence, Fourth Edition, page 41, at Chapter 4, Section 35, it is held:

“Proof of *corpus delicti*—General requirements. —To convict one of crime, proof must be made that the offense was committed and also that the accused was the perpetrator or one of the perpetrators of the offense, Case Cited * * *.

“*Corpus delicti*” is the body of the crime or the offense, cases cited, and this usually includes the agency of the accused, cases cited. However, strictly speaking, “*Corpus delicti*” means actual commission of a crime and some one criminally responsible therefor, Cases Cited, and proof of de-

fendant's connection with such crime is not part of the corpus delicti, cases cited.

“Proof of the corpus delicti is essential to a conviction, cases cited, must be proved beyond a reasonable doubt, cases cited, and must exclude every hypothesis other than a crime was committed in order to convict.” Cases cited.

In the case at bar the mere striking of the match did not establish the corpus delicti, (a) because it could have been struck for the purpose of smoking and, (b) it could have been struck for the purpose of observing the place because of darkness without any intent on anyone's part to set fire to the warehouse as alleged in the indictment. The indictment charges that petitioner did attempt to set fire to certain warehouses. The evidence shows that the petitioner struck a match but nowhere does the evidence show that an overt act was committed to make the crime complete so as to be cognizable in a Federal Court. It is obvious that if a man had in mind to set a fire and later was prevented from doing so that no crime was committed. The same rule applies where a man has in mind to commit a crime and prior to its commission he abandons such intent, that is, he cannot be punished unless he carries into execution the intent to make the attempt complete under the statute. See the Supreme Court's decision in *Jerome v. United States*, 318 U.S. 101, in construing federal statutes. In the case at bar your petitioner respectfully urges that the only evidence shown by the testimony was the striking of

a match. This was not sufficient to support a conviction in the case at Bar. See *Cox v. United States*, Cir., 96F (2d) 41, therein the Court held:

“* * * Evidence which is consistent with two conflicting hypothesis tends to prove neither, *Gunning v. Cooley*, 281 U.S. 90, 94, 50 S. ct. 23174 L, Ed. 720; *Stevens v. The White City*, 285 U.S. 195, 204, 52 S. ct. 347, 76 L. Ed. 699. *Svenson v. Mutual Life Ins. Co. of New York*, 8 cir., 87 F. (2d) 441, 443; *New York Life Ins. Co. v. King*, 8 cir., 93 F. (2d) 347, 353; and proof of circumstances which, while consistent with guilt, are not inconsistent with innocence, will not support a conviction. *Spalitto v. United States*, 8 cir., 39 F. (2d) 782, 784; *Van Gorder v. United States*, 8 cir., 21 F. (2d) 939, 942; *Cravens v. United States*, 8 cir., 62 F. (2d) 261, 274; *McChintock v. United States*, 10 cir., 60 F. (2d) 839, 842.”

The Court goes on to say:

“* * * However, where it clearly appears in a criminal case that a defendant has been convicted of an offense which the evidence fails to show was committed, the error of submitting the case to the jury for determination is so plain and vital that this court is at liberty to and will reverse even in the absence of a proper motion and exception, not because the defendant has a right to demand a reversal, but solely in the public interest and to guard against injustice. *Wilborg v. United States*, 163 U.S. 632, 658, 16 S. ct. 1127, 1197, 41 L. Ed. 289;

Ayers v. United States, *supra*, 8 cir., 8 F. (2d) 607, 609, 610." [Emphasis supplied.]

Petitioner earnestly submits that the court as well as the jury was prejudiced, which prejudice arose out of news paper articles published showing that petitioner attempted to sabotage buildings where war material was being produced where, as here, there was no attempt to sabotage any buildings in that the evidenc clearly shows that some one struck a match, which striking of a match did not constitute a crime under Title 50 U.S.C.A. section 102. The mere striking of the match failed to establish the corpus delicti and there was no evidence sufficient to convict, therefore, the judgment and sentence must be set aside and the verdict quashed and a new trial granted, or vacated set aside and held for naught.

For the purpose of showing the sharp conflict of testimony of the Government witnesses and for the further purpose of showing that witness Green could not have possibly identified this petitioner, it is here shown by the Government's own witness, a one John Cupple who was at the place where the supposedly alleged offense was committed, that is, the said John Cupple was within twelve feet of the person who struck the match and testified as follows:

My name is John Cupple. I am a leader man or carpenter at Richmond No. 2 for Hopeman Bros. I am familiar with the location of the various buildings in the plant there. There could be more

than one shipfitting shop or pipe shop in Richmond shipyard No. 2, but the main pipe shop is located right by the Hopeman warehouse, possibly 10 feet away. It is a parallel building. I was employed there on the 28th of July this year. At that time I was a leader man and was in the warehouse to get material for the ship. I was working on the graveyard shift, that is, from 11:30 p.m. to 7:00 o'clock a.m. I had a helper but he was not in the warehouse. When I noticed the incident there were other persons in the warehouse, a truck driver and a truck driver's helper. The truck driver's helper was a man named Pacheco. I, myself, cannot identify the defendant on trial here. The incident that happened was this: I was standing there and I just simply asked who the fellow was. Of course, I could not identify the man. I asked Pacheco who the fellow was. I asked Pacheco and the truck driver who he was. We were all there in the warehouse at the time the incident arose and I just happened to ask who the fellow was as the fellow walked through the warehouse. I do not know who the man was and I couldn't identify him. The conversation occurred in this way: A person that kind of aroused our curiosity. He happened to be a rather well dressed fellow like some high official, you know. It just came from a blue sky, who this guy would be. Well, it just came to me that this was some official of ours that was coming through our warehouse, so that is show it aroused my curiosity who he was, so I asked who this fellow was,

otherwise I wouldn't have thought anything about it. There was no reason for anybody else to be in the warehouse. The truck driver was a man named Dick Darling. I don't know where he is now. At the time of the conversation we were standing in the tool room which connects with the timekeeper's office. The office is in the corner of the building and the tool room connects with it. I am familiar with the floor plan of the place. On Government's Exhibit 5 which you show me here is the office and here is the tool room. We were just standing inside of the tool room. When I saw the individual I would judge he passed about 12 feet from me, I wouldn't say exactly. (2)* I asked Pacheco who he was or who he might be. I wouldn't say he was really well dressed, but he was dressed rather nicely, not in a suit or anything like that. He passed by before I got a look at his face. I think he was medium build, a stocky built person. The fellow I saw was a stocky built person. He was just passing through.

Cross-Examination

When I saw this individual he was in the passageway going west in front of the office to the outer door. On the floor plan that you indicate to me the office is approximately to where you are pointing.

(2)* Witness Green testified the person was six feet tall and weighed 180 pounds; here Cupples testified that he observed the person from twelve feet distant and that such person was of medium build, a stocky fellow.

This is the office (indicating on floor plan), and we were at this point here at the time I noticed him. He was travelling in this direction but due to the fact that I had no reason to watch him any further or pay any attention to him, that is the last I saw of him. The person I saw was walking at a fast pace. He was just simply walking along and then all of a sudden I didn't see him any more. I saw a person passing by that was a stranger to me and there was nothing about his action or manner that caused any concern in my mind. I can't really describe anything about his dress. My impression is that he could have been an officer of the company. He wasn't dressed in dark clothes. Usually when we work over there we wear overalls or a jacket with work trousers. The workmen dress in different manners and it is quite a common thing there for the men to wear jackets such as Government's Exhibit 9a. I don't think the person I saw that evening had a jacket on like Government's Exhibit 9a. My recollection is that he was stocky build and of medium height. I would judge him to be about 5 feet 10 inches and I suppose he would weigh about 170 pounds.

An incident occurred there that evening that I heard about later. I know Mr. Moran, the gentleman who sits at the counsel table behind Mr. Licking. I have talked to Mr. Moran in connection with this case. He questioned me concerning my knowledge of the incident and he asked me to describe the person I had seen, and I gave him the

same description that I have given here. He exhibited certain photographs to me. I have not seen Government's Exhibit 8a which you showed me, before.

Whereupon at the request of counsel for defendant, defendant Roedel was requested to stand.

I have no recollection of seeing this man who is now standing in the Court room (the defendant) other than on Angel Island when I went over there. I do not recall seeing him in the plant of the Richmond Shipyard.

Whereupon the following statement was made by Mr. Licking, the Assistant United States Attorney:

Mr. Licking: No question. If the court please, I have no more witnesses; the Government closes at this time. I would like, however, with the understanding, of course, that if the evidence at this time is deemed insufficient we might have an opportunity of calling a further witness, which would not have any effect upon any rights the defendant has at this time; but it is my intention to find the truck driver who was there, if I can. At the present time they shift around and it is difficult to find him; it is my intention to have him here, although he cannot—he is in the same position as this man. Cupples, he cannot identify the defendant. He was there at the time. But I don't want any adverse inference to be drawn to the effect that he is not produced, and I want to try to produce him at a later date if I can find him.

Mr. O'Connor: I understand your present posi-

tion to be that you have made an effort to locate the man and cannot.

Mr. Licking: That is true.

Mr. O'Connor: I will stipulate that if he were called he could not identify the defendant.

Mr. Licking: He cannot identify the defendant. He simply saw the individual walk by and he was shown the photograph, as was this witness, and he could not identify him.

Mr. O'Connor: I will so stipulate.

Whereupon it was stipulated between counsel for the Government and counsel for the defendant that the defendant was employed from April 25, 1942, to May 27, 1942, as a shipfitter's helper, and that he was so employed at Richmond shipyard No. 2 as a shipfitter's helper until the Immigration authorities on a Presidential warrant, charging him with being an alien enemy.

Whereupon the Government rested its case.

Whereupon the defendant moved the Court for a directed verdict of not guilty on the ground that the evidence was insufficient, which motion was by the Court denied.

It is respectfully submitted that since witness Cupples testified that petitioner was not the man the night of the alleged incident, that witness Green had been directed to identify the defendant in Court in that witness Cupples testimony was in conflict with the testimony of Witness Green and, petitioner will point out to show this Honorable Court that Witness Green was showed petitioner at the

time petitioner was singled out of a line-up, to wit, the record discloses that:

On that morning I had an interview with Mr. Green and with the Chief of Police, Mr. Walls. I subsequently talked to another employee and a Mr. George Pacheco. He is employed there as a truck driver's helper.

On August 19 I had an interview with Mr. Green and at that time I exhibited to him a photograph which you now show me. The photograph is one of defendant Heinrich Roedel. On August 20, I arranged that Mr. Green should go to the Alameda County Jail in the Court House and at that time Mr. Green was brought into the visitor's cell at my request. There is a glass on one side and a door with a slot in it on the other. At that time Roedel and I went in the room together and I had a conversation with him. At my directions he assumed various poses sideways and frontways and in the meantime Mr. Green was observing the defendant through the slot in the door that I have mentioned.

. Whereupon the photograph referred to was marked "Government's Exhibit No. 8 for Identification."

I had a second conversation with George Pacheco on August 20. I did not exhibit to him at that time the photograph "Government's Exhibit No. 8 for Identification." On August 20 at the Alameda County jail George Pacheco was placed outside the door with the slot in it, and Mr. Roedel was brought into the room and I had him assume various poses

sitting and standing, a profile view and a front view, while Pacheco looked in from the side through the slot. Prior to that time Mr. Pacheco had not been shown the photograph of the defendant.

I later had a conversation with a taxi driver named Lawrence Kaylor, who drove for the Owl Cab Company in Richmond. In connection with my first conversation with him I showed him the photograph, "Government's Exhibit No. 8 for Identification." That was in October, 1942.

* * *

Petitioner respectfully contends that on Moran's first visit he had Witness Green with him and that Witness Green viewed petitioner as singled out in a separate room. However, no identification was made at that time and, on October 2, 1942, Moran returned with Witness Green and a one Larry Kaylor, a taxi driver. Witness Green then stated that petitioner was the man with who he had struggled with in the warehouse. But it has never been a rule in such cases to single out a man alone for the purpose of making identification. Here Moran concedes that this method is unusual, in that:

"In this case, I did not put several persons in a room and ask the prospective witness to be brought in and to pick out the person he thought guilty."

Petitioner respectfully submits that Green's testimony is in direct conflict with the testimony of Witness Cupples. It is respectfully submitted that if Cupples could not identify the petitioner neither could Witness Green and that Witness Green could

not of identified petitioner without first being told to do so by Moran. In *Cox v. United States*, supra, the court speaking on the subject of conflicting evidence held that:

“* * * Evidence which is consistent with two conflicting hypothesis tends to prove neither, cases cited in support thereof.” (See *Cox v. United States*, cited Supra.)

VII.

Point Three

Petitioner Was Not a Member of the Storm Troopers

Petitioner respectfully urges that there was no evidence or proof that he was a member of the Storm Troopers, in that, the Government in its brief in this Court in *Roedel v. United States*, 9 Cir., No. 10,435, stated petitioner admitted that he was a member of the Nazi and a Storm Trooper (Br. 2). The record in the case at bar clearly shows that petitioner testified, to-wit:

Tr. p. 118: “From his talk with me, I find out that he found this card. I did not know it was in the case. I had a lot of sport medals that I had won in Germany. I didn’t know about that swastika pin. Moran asked me why I had not told him before that I was a Storm Trooper, and I told him that I had never been a storm trooper and he asked me if I ever did any Storm Trooper duty, and I told him no, and that I never had any uniform on. The card which you show me being Government’s Exhibit 8-B

is a temporary permit in the Marine group. It is a kind of a party, S. A. and it has been signed by the head man or Fuehrer of the Marine Storm. The name of the man who signed it is Wolf. I got this card in Bremen before I sailed the last time. In 1933 when I was at my grandparent's home, I told my grandfather that I was going back to sea and that I was going back to the United States as soon as I could, and I went to North German Lloyd Line. I asked my grandfather to sign a letter to a man named Scrader, whom he knew and who was with the North German Lloyd. If you had not been to sea for a period of a year or more, the North German Lloyd could not employ you as a seaman unless you had special permission. All men on board belonged to the S. A. Marine Storm. They have to take a course in everything you do on ship, how to handle the ship in case of storms, how to handle lifeboats, to study your compass, and what to do in case the ship catches fire. I got this card after I joined the Marine Storm. I did not have to pass an examination or go to school—it was just a temporary permit. I don't think it is even good for six months. All sailors at that time had to belong to the S. A. to get a ship. I think I paid \$2.00 but I am not sure. It is not a union—there is only one union in Germany and that is the Labor Front. They control everything.

The medal object which you show me (Government's Exhibit 8-C) is a swastika emblem. It is a special emblem for the Marine Corps. On German

Navy ships, they wear these. They have got that same flag—it is special for the Marine Group. The emblem badge which you show me, Defendant's Exhibit D, is something I got in New York. These flags are Irish flags. I remember at the time—I was in New York, 1928, a plane came over from Germany, flying from East to West, with Fitzmore an Irishman, and a German Baron, and they were in a car and drove all around New York and people bought these flags. I bought the emblem badge on the street in New York when the fliers came in and had a parade. The picture that you show me I had made in New York and the flag that is on it I had put on in Japan. The pin that you show me is a S. A. pin. I never noticed that these things were in the box.

I have not at any time been a member of or been employed by or been in service of any German organization or the organization of any foreign power for the purpose of or instructions to do any damage to any property or person in the *in the* United States. I came back in 1936 because I like this country. I played with boys from America when I was a kid in my home town. That is why I like this country. I was not within the confines of the Richmond Shipyard No. 2 in Richmond, California, on the night of July 27 or the early morning of July 28.” (Tr. 118-119-120.)

The above and foregoing testimony of the petitioner refutes the Governments claim that petitioner admitted he was a member of the Nazi Party and

a Storm Trooper. In the Government's Brief, at page 2, counsel states that petitioner admitted that he *was member* of the Nazi Party and a Storm Trooper and cited the record at page 31. However, counsel forgot that at page 31 of the record that such testimony was that of Robert H. Moran, a member of the Federal Bureau of Investigation.

Petitioner respectfully urges that the Government's offer of the S. A. pin, and the swastika emblem, was for the purpose to establish prejudice with the jury and did not have any relationship to the crime for which petitioner had been indicted and for which he was being tried. The Statute (50 U.S.C.A. Section 102) is not restricted to enemy aliens, in that, such Statute makes it a crime for any person that may violate that section, to wit:

"When the United States is at War, whoever, with intent to injure, interfere with, or obstruct the United States or any associate Nation in preparing for carrying on the War * * * shall wilfully injure or destroy, or shall attempt to so injure or destroy, any war material, and etc. * * *."

Therefore, such admission of the S. A. pin, and the swastika emblem, was prejudicial error because it influenced the minds of the jury to render a verdict (not on the evidence) but namely because the jury believed petitioner to be a member of the Nazi Party and a Storm Trooper. It is urged that such articles aforesaid were not a part of the *res gestae* and was reversible error to admit such articles for

prejudice only. In this respect your petitioner relies upon

Underhill's Criminal Evidence, Fourth Edition, at page 149, section 115:

"The propriety and justice of permitting articles and implements, such as deadly weapons, lanterns, masks, counterfeiters' tools, gambling apparatus and the like, used by criminals, but which are not shown to be connected with the accused, to be exhibited to the jury may well be doubted. Such a practice, under the pretext of illustrating or explaining evidence, is well calculated to prejudice the jury against the accused. Generally where the sole purpose is to arouse prejudice, pity or other passion, and no legitimate aim is served, it is error to admit articles thus offered. Cases cited. Lack of some sort of identification or connection with the crime, a plea of guilty, failure to shed any light on an issue, or failure to show condition unchanged, are other grounds of barring articles from admission as evidence." (Cases cited.)

In the case at bar the Court overruled objections to the Government's admission of the articles into evidence; exceptions were taken and noted in the record. Petitioner respectfully submits that such articles prejudiced him with the jury and, by reason that such articles did not connect with the crime charged in the indictment that they were admitted solely for the purpose to prejudice him with the jury and was reversible error.

VIII.

Point Four

Petitioner Was Deprived of the Right of Filing of
Petition for Writ of Certiorari in That His
Counsel Misrepresented the Law Governing the
Time Element Under the Federal Rules of
Criminal Procedure

Petitioner respectfully contends that this point is raised separately from the judgment of conviction and sentence in that his remedy to apply to the Supreme Court for Writ of Certiorari was denied him because his counsel did misrepresent the law on the time element for filing of Writ of Certiorari and therefor petitioner was deprived of the effective assistance of his counsel in the course of his appeal and that the proceedings had in the United States Court of Appeals were void and its judgment should be vacated as though no appeal had been taken from the judgment of conviction in this Honorable Court and, by reason alleged under points, one, two and three, the said Judgment and sentence should be vacated set aside, and for naught held, and the verdict of the jury quashed in accordance with law as heretofore cited above, in that:

Title 28 U.S.C.A. Section 391 provides that:

“* * * On the hearing of any Appeal, Certiorari, writ of error, or motion for new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the Court, without regard to technical errors, defects, or exceptions which do not effect the substantial rights of the parties.” (Emphasis supplied.)

The right to "assistance of counsel" is assured in federal prosecutions by the terms of the Sixth Amendment, the Supreme Court has progressively added substance to the right by requiring that assistance be effective. *Glasser v. United States*, 315 U.S. 60 (1942): see *United States ex rel. Mitchell v. Thompson*, 56 Fed. Supp. 683, 686-87 (S.D.N.Y. 1944). And by identifying as significant such elements as; and the presence of and uncompromised efforts by counsel at all stages of the proceedings. *Glasser v. United States* *supra*; see *United States ex rel. Hall v. Ragen*, 60 F. Supp. 820, 824 (and this includes a court-appointed attorney). *Johnson v. Zerbst*, 304 U.S. 458 (Sixth Amendment). Procedure.

Rigid "record worship" Pound, Appellate Procedure in civil cases (1941) 35: Note (1943) 56 Harv. L. Rev. 1313 on appeal entrenched both judicial oblivious to the distinction between incapacity and incompetence, and reluctance to grant a new trial for lack of effective assistance of counsel. The restriction to evidence appearing in the record has prevented defendants from marshalling proof of the denial of the right before the appellate court, and has created, innumerable precedents for denying new trials for alleged incompetence. Thus, the rule for ineffective counselling would not result in a new trial became further embedded, "even where the allegations went to the capacity of counsel, unless the defendant has shown that he was seriously prejudiced, new trials have been ordered for: failure to

object to wholly prejudicial and irrelevant evidence, where evidence was close, and the court permitted the prosecution to take advantage of defendant (*People v. Gardiner*, 303 Ill. 204, 135 N. E. 422): failure to present proof or to impeach witnesses (*People v. Shulman*, 299 Ill. 125, 132 N. E. 530). This insistence by appellate courts on prejudice in the record makes the requirement of competent counsel no more than a device to all attacks on harmful rulings not excepted to below: If the court is to be restricted to prejudicial errors in the record by which hypothesis would result in a new trial, the only effect of offering proof of incompetence is to free the defendant from the need to except when the harmful rulings are made. *People v. Gardiner*, *supra*; see *People v. Pierce*, 387 Ill. 608, 614-615, 57 N. E. (2d) 345, 348.

One procedural device, Writ of Error Coram Nobis (Now Motion) avoids the procedural rigors which diminish the utility of appellate procedure to attack a conviction *People v. Butterfield*, 37 Col. App. (2d) 140, 99 P. (2d) 310. A motion for a new trial allows evidence other than that appearing in the record of the original proceedings to be presented *E. G. Cordova v. State*, 190 S. W. (2d) 826 (Tex. Cr. App.). Where such a motion is based upon newly discovered evidence, proof of incompetence or negligence of the attorney in searching out the evidence sometimes relieves defendant of the requirement of "due diligence" that would otherwise have defeated the motion. *Johnson v. United*

States, 110 F. (2d) 562 (app. D. C.). (Counsel appointed by court.) See *People v. O'Brien*, 110 App. Div. 26, 96 N. Y. Supp. 1045 (2d. Dept. 1905). The writ of error coram nobis, or its statutory analogue is an apt procedure for raising the issues, since it permits the introduction of evidence probative of incompetence of counsel as an ingredient of his constitutional rights, a defendant in a criminal action is assured effective assistance of counsel. This assurance may be absolutely or conditionally construed. The requirements of a smooth functioning system of criminal justice necessitate distinguishing between incapacity, an absolute cause for reversal, and professional ineptitude, a bases under certain conditions. Besides uncritical substantive treatment, procedural fetters have eroded the requirements of effective assistance where a conviction is attacked on these grounds. However, procedures are available to challenge a conviction in which the defendant was not competently represented, and under the better reasoned decisions of the Supreme Court, new trials should be ordered if the facts meet the suggested requirements. There is no need to restrict the procedure for raising these issues to appeals; and no reason to limit the scope of other available procedures by precedents born of "record worship." See, Notes (1947) 1 Col. L. Rev. 115, 116, 118, 120, 121, 122, 123.

In the case of *Thompson v. Johnston*, 9 Cir., 160 F. 2d 374, the court in the majority opinion held that if Thompson had of shown any prejudice that

habeas corpus would lie to release him, the court's opinion states at page 375, that:

“The petition here shows no lack of evidence of guilt, no error in the conduct of the trial, nor any other circumstance which might have warranted a reversal had an appeal been taken, that is to say, there is an entire absence of any showing of prejudice. In this posture of affairs the dismissal was proper. *CF. Miller v. Sanford*, D. C. 59 F. Supp. 812, and same case on appeal, 5 Cir., 150 F. (2d) 637, *Certiorari denied* 326, U.S. 787, 66 S. Ct. 472. We do not mean to intimate that if there had been a showing of probable cause for an appeal habeas corpus would afford an appropriate corrective; case cited in the footnote. We express no opinion as to that.” (Emphasis supplied.)

In the case at bar petitioner urges that he had written out certain facts and assigned certain grounds for reasons of applying for writ of *Certiorari* but his Counsel advised him that he had plenty of time as *Certiorari* could be applied for within ninety (90) days. Through such misrepresentation petitioner lost his right of appeal on *Certiorari*. That having shown prejudice heretofore and upon the majority of the Court's opinion in *Thompson v. Johnston*, *supra*, petitioner turns to the dissenting opinion of the Honorable William Denman in the *Thompson* case in that the law is applicable stated in connection with this point; there, as here:

“The Court's opinion decides an important question of Constitutional law contrary to the decision

of the Supreme Court in *Cochran v. Kansas*, 316 U.S. 255, 62 S. Ct. 1068, 86 L. Ed. 1453; *Glasser v. United States*, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680, and *McCandless v. United States*, 298 U.S. 342, 56 S. Ct. 764, 80 L. Ed. 1205.

It further decides a question of constitutional law in conflict with the law as stated by the Court of Appeals for the District of Columbia in *Boykin v. Huff*, 73 App. D. C. 378, 121 F. (2d) 865. It also overrules sub silentio the decision of this Court in *Wilfong v. Johnston*, 156 F. (2d) 507.

This Court's opinion holds that though a sentenced man, desiring to exercise his constitutional rights to access to counsel and to file notice of appeal, has been prevented from — exercising such rights by the wrongful acts of the Attorney General's agents and thereby lost his appeal, his petition for a writ of habeas corpus must be denied if it do not show the errors in his trial he would have relied upon if he had taken the appeal. See footnote *infra*.

That is to say, though Thompson show his constitutional right to due process has been denied, in addition he must show affirmatively that the denial has been prejudicial. The law is exactly the contrary. 28 U.S.C.A. Section 391 provides

“* * * On the hearing of any appeal, Certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the Court shall give judgment after an examination of the entire record before the Court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.”

Construing this provision in a civil case (hence, a fortiori, applicable here) the Supreme Court in *McCandless v. United States*, 298 U.S. 342, 347, 56 S. Ct. 764, 766, 80 L. Ed. 1205, states

“* * * That section simply requires that judgment on review shall be given after an examination of the entire record without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties. This, as the language plainly shows, does not change the well-settled rule that an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it affirmatively appears from the whole record that it was not prejudicial. *United States v. River Rouge Co.*, 269 U.S. 411, 421, 46 S. Ct. 144, 70 L. Ed. 339; *Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76, 82, 39 S. Ct. 435, 63 L. Ed. 853; *Williams v. Great Southern Lumber Co.*, 277 U.S. 19, 26, 48 S. Ct. 417, 72 L. Ed. 761.” (The underscoring is in the opinion.)

Citing to the above from *McCandless Case*, the Supreme Court, in *Glasser v. United States*, 315 U.S. 60, at page 76, 62 S. Ct. 457, 467, 86 L. Ed. 680, in reversing a conviction because of the denial of the assistance of counsel, states

“* * * The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.”

The case of *Cochran v. Kansas*, *supra*, reversing *Cochran v. Amrine*, 153 Kan. 177, 113 P. 2d 1048, also holds to the contrary of this Court's opinion.

The petition for the writ there stated no more than that the state prison authorities had prevented the petitioners appeal from his conviction. The Kansas Supreme Court held that the record of his prosecution showed he had no ground of appeal, stating at page 1049 of 113 P. 2d:

“* * * There is nothing in the record of the proceedings in the Court below to indicate any irregularity in the petitioner’s trial and conviction, and certainly nothing to indicate that his commitment was void for any reason.”

Nevertheless, because Cochran was denied access to counsel and his appeal thus frustrated, the case was returned to the Kansas Supreme Court for the determination of the issue whether he was refused the privilege of an appeal, the Supreme Court stating, at page 258 of 316 U.S., at page 1070 of 62 S. Ct.

“* * * However inept Cochran’s choice of words, he has set out allegations supported by affidavits and nowhere denied that Kansas refused him privileges of appeal which it afforded to others. Since no determination of the verity of these allegations appears to have been made, the cause must be remanded for further proceedings.”

In the habeas corpus proceeding of *Boyhin v. Huff*, cited in the Court’s opinion, the record shows at page 869 of 12 F. 2d that Boyhin’s petition stated no error in his trial and no more than “I wish to prosecute an appeal, inasmuch as there is an admitted possibility, however, remote, of a reversal of a decision.” (The underscoring is in the opinion.)

In our recent decision of *Wilfong v. Johnson*, 156 F. 2d 507, Wilfong was sentenced in the absence of his counsel. We held the conviction valid but that the sentence should be set aside, though the petition made no claim that counsel's presence there would have made any change in the sentence. What concerned us (page 510 of 156 F. 2d) was that it was possible Wilfong's Counsel would have done something towards the amelioration of his sentence, just, as here, Thompson's counsel in all likelihood would have filed notice of appeal.

The relief here sought is that customarily granted in an equitable proceeding where a successful litigant wrongfully possesses a judgment it is not entitled to hold. I cannot see no difference between ordering the setting aside of a judgment procured by the wrongful act of the United States, the successful prosecuting litigant, as in the case of *Anderson v. United States*, 318 U.S. 350, 357, 63 S. Ct. 599, 87 L. Ed. 829, (footnote *infra*) and the instant case of the United States, the successful litigant, retaining its judgment made final through the wrongful acts of the custodial agent in preventing an appeal.

I further dissent from the Court's statement in the last paragraph of the opinion that the *Cochran* and *Boykin* cases have no application to the instant case because "The circumstances in *Cochran v. Kansas*, *supra*, were different. There the Court to which the matter was remanded for inquiry was the Court possessing jurisdiction to review for error the judgment of Conviction; and similar jurisdic-

tional situations existed in *Boykin v. Huff* * * *."

That is to say, if the Attorney General has confined a prisoner in the Eastern District of Tennessee where he was tried, his application for the Writ in that district might have greater validity because the Sixth Circuit Court of Appeal would remand the habeas corpus proceeding to the Court in which the petition was filed. The contention seems to be that since the Attorney General chose the Northern District of California as the place of confinement, the violation of the prisoner's constitutional rights are not to be considered.

This seems extraordinary doctrine. The only district Court in which the petitioner may file his Writ is that of the district where he is confined. *Jones v. Biddle*, 8 Cir., 131 F. 2d 853. (Emphasis supplied.)

Quoting further from Judge Denman's dissenting opinion, at page 378, that:

"I further dissent from the incredulity of the Court's opinion in its statement that *Cochran v. Kansas* and *Boykin v. Huff* "may be thought to throw doubt on the question whether the statutory right of appeal is not a part of due process as guaranteed by the Fifth Amendment." These cases following the statement of the Supreme Court in *Frank v. Mngum*, 237 U.S. 309, 327, 35 S. Ct. 582, 587, 59 L. Ed. 969,

"* * * And while the 14th Amendment does not require that a state shall provide for an appellate review in criminal cases * * * it is perfectly obvious that where such an appeal is provided for, and the

prisoner has had the benefit of it, the proceedings in the appellate tribunal are to be regarded as a part of the process of law under which he is held in custody by the state, and to be considered in determining any question of alleged deprivation of his life or liberty contrary to the 14th Amendment," remove all doubts that a defendant in a federal criminal prosecution no more can be denied due process with reference to his appeal than with reference to his trial in the district Court."

In the case at bar the Certiorari petitioner was seeking was as applicable to the judgment of this Court, as it was of that of the judgment of the Circuit Court, in that, it was possible that the Supreme Court would have reversed the judgment of conviction of this Court by its order of reversal of the judgment of the Circuit Court that affirmed the conviction of this Honorable Court. This Honorable Court cannot say that its judgment was free from error since there has been shown the sharp conflict of testimony of Witness Green and Witness Cupples.

Conclusion

It is respectfully submitted that in the case at bar an innocent man has been convicted upon the sole testimony of Witness Green, which testimony in part shows that Green was taken to the jail to view the petitioner, not in a line up, but in a cell singled out for that purpose which petitioner claims was wrong because it indicates that the department of justice just the same as said to Witness Green: "this

is the man we want you to identify and since you could not pick him out of a show-up, we think you know why the petitioner has been placed in a single cell." On the other hand, Witness Green could not have identified petitioner any more than Witness Cupples. In observing petitioner as he did "Witness Green" was not doing so for the purpose of identification but to learn of petitioner's action and the way he looked from different positions. This is an old method of framing the innocent, a method that was outlawed many years ago. The Government must sustain the burden of proof beyond a reasonable doubt before a conviction will be allowed to stand in a federal court. In the case at bar the Government failed to establish that petitioner was guilty beyond a reasonable doubt, in that, Witness Cupples' testimony overcome the testimony of Witness Green, notwithstanding that Witness Pacheco testified against petitioner in that Witness Pacheco's testimony was in direct conflict with the testimony of Witness Cupples. If the Government had of brought in Dick Darling then the testimony of Cupples would have been corroborated by the testimony of Witness Darling. The failure of the Government to produce the witness Dick Darling was a denial of due process of law petitioner was entitled to under the Fifth Amendment to the United States Constitution. Dick Darling's testimony was favorable to petitioner in that the Government stipulated that if Witness Darling was produced he could not identify petitioner. However, a failure of the Govern-

ment to produce Witness Darling gave the impression on the minds of the jury that there was no such testimony notwithstanding the stipulation of the Government that if Dick Darling was present he could not identify petitioner. The testimony of Dick Darling was for the jury and the Government could have no doubt found Witness Darling even at a later address if not found at the place where he had been living at the time he was employed as a truck driver, all of which is respectfully submitted.

Respectfully submitted,

/s/ HEINRICH ROEDEL,
Box 651—P. M. B.,
Alcatraz, California.

Prayer for Relief

Wherefore, your petitioner respectfully prays that this motion be granted and that this Honorable Court make its order directing the United States Attorney, to appear at a time and occasion thereat to be set forth to show cause, if any he have, why the foregoing motion should not be granted and the judgment and sentence vacated and for naught held, and the verdict of the jury quashed, and petitioner discharged from the custody of the Warden of the said United States Penitentiary, Alcatraz, California, and petitioner will ever pray.

/s/ HEINRICH ROEDEL,
Box 651-P.M.B.,
Alcatraz, California,
Petitioner.

Verification of Oath

State of California,
County of San Francisco—ss.

Heinrich Roedel, having been first duly sworn, deposes and says: that he is the petitioner in the above and foregoing motion; that he has read and knows the contents of same; that the allegations contained therein are true and correct.

/s/ HEINRICH ROEDEL,

Affiant.

Subscribed and sworn to before me this 31st day of December, 1949.

Records at U. S. Penitentiary, Alcatraz, California, Indicate That Heinrich Roedel Is Not a Citizen of the United States.

/s/ P. J. MADIGAN,

Associate Warden, United States Penitentiary, Alcatraz, California.

Warden-Associate Warden authorized by the Act of February 11, 1938, to administer oaths.

PETITIONER'S EXHIBIT A

Richmond Independent

July 29, 1942

Attempt to Set Shipyard Fire Balked by Guard

A deliberate attempt at sabotage at the Richmond No. 2 shipyard early yesterday morning was foiled by a plant guard when he apprehended a man in

the act of lighting a fire to a large pile of kiln dried lumber, police revealed today.

The guard grappled with man, apparently an employee, but he broke loose and made his escape by intermingling with other employees in the plant.

A police investigation revealed that a pile of oil-saturated rags had been placed under the lumber. The fire was never actually lighted because the guard saw the would-be saboteur light the match and he ran to apprehend him.

FBI Investigates

Although shipyard guards have been making a minute search of the plant, the Federal Bureau of Investigation has also been notified. FBI officers declared today that a complete investigation is being made but offered no further comment. The Richmond police department is also aiding in the search.

Police declare that the pile of lumber is not the property of the shipyard proper but belonged to a subcontractor. If the lumber had burned it might have spread to a nearby warehouse, also owned by the subcontractor, but police doubt that it could have caused much damage to the main shipyard structures.

Because of the darkness between the piles of lumber, the guard who apprehended the man as he attempted to light the fire was able to get only a meager description. However, police declared an intensive search for the man will be continued.

PETITIONER'S EXHIBIT B

Office of the Clerk,
Supreme Court of the United States
Washington, D. C.

December 22, 1944

Mr. Henry H. Roedel,
San Francisco, California.

Dear Sir:

Replying to your recent letter, you are advised that it is not the practice of this Court to appoint attorneys to assist litigants in the preparation of cases to be filed in this Court. It is up to you to file your own case or to secure an attorney to file the case.

You have thirty days, exclusive of Sundays and holidays within which to file your case in this Court. There is no possibility of extending that thirty-day period.

Under separate cover I am sending you a copy of the Revised Rules.

Yours truly,

CHARLES ELMORE
CROPLEY,
Clerk,

By /s/ E. P. CULLINAN,
Assistant.

EPC:ED

Via Air Mail.

PETITIONER'S EXHIBIT C

Office of the Clerk,
Supreme Court of the United States,
Washington, D. C.

13

January 10, 1945

Mr. Henry H. Roedel,
San Francisco, California.

Dear Sir:

Your application for an extension of time was presented to Mr. Justice Douglas who has endorsed thereon that the motion is denied "for lack of power to grant it."

It has been repeatedly held that a Justice has no power to extend the time in a case arising under the Criminal Appeals Rules. You have thirty days from the date of the judgment within which to file a petition for certiorari in this Court, or if a timely petition for rehearing was filed, thirty days from the date of the order denying that motion.

Yours truly,

CHARLES ELMORE
CROPLEY,
Clerk,

By /s/ E. P. CULLINAN,
Assistant.

EPC:KEB

PETITIONER'S EXHIBIT D

Office of the Clerk,
Supreme Court of the United States,
Washington, D. C.

13

February 3, 1945

Mr. Henry H. Roedel,
Alcatraz, California.

Dear Sir:

Replying to your letter of January 28th I can only reiterate that it has been repeatedly held that a Justice has no power to extend the time in a case arising under the Criminal Appeals Rules. You have thirty days from the date of the judgment within which to file a petition for certiorari in this Court, or if a timely petition for rehearing was filed, thirty days from the date of the order denying that motion.

Yours truly,

CHARLES ELMORE
CROPLEY,
Clerk,

By /s/ E. P. CULLINAN,
Assistant.

EPC:KEB

[Endorsed]: Filed January 6, 1950.

[Title of District Court and Cause.]

ORDER DENYING MOTION TO VACATE
JUDGMENT AND SENTENCE

Inasmuch as the motion of the petitioner filed January 6, 1950, and the files and records of the case conclusively show that the petitioner is entitled to no relief, his motion to vacate judgment and sentence is hereby denied.

Dated: January 9, 1950.

/s/ LOUIS GOODMAN,
U. S. District Judge.

[Endorsed]: Filed January 10, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE UNITED
STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

Notice is hereby given that Heinrich Roedel, in propria persona, the petitioner and appellant herein, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order denying his motion to vacate judgment and sentence and to quash the verdict as made and entered on the 19th day of January, 1950.

Respectfully submitted,

/s/ HEINRICH ROEDEL,
P.M.B. 651,
Alcatraz, California.

Records at U. S. Peniteniary, Alcatraz, California, Indicate That Heinrich Roedel Is Not a Citizen of the United States.

Subscribed and sworn to before me this 31st day of January, 1950.

[Seal] /s/ P. J. MADIGAN,
Associate Warden,
Alcatraz, California.

Warden-Associate Warden authorized by the Act of February 11, 1938, to administer oaths.

[Endorsed]: Filed February 2, 1950.

[Title of District Court and Cause.]

DESIGNATION OF RECORDS ON APPEAL
To the Clerk of the Above-Named Court:

Please prepare and send to the said Circuit Court of Appeals for the Ninth Circuit the following papers and records, to wit:

1. Motion of Appellant's to vacate the judgment and sentence, etc.
2. Appellant's Exhibits A, B, C, and D.
3. Judge's instructions to the jury as originally given at time of trial.
4. Order denying motion to vacate judgment and sentence.
5. Notice of Appeal.
6. Designation of records and service thereon.

Respectfully Submitted,

/s/ HEINRICH ROEDEL,
Box 651—P.M.B.
Alcatraz, California.

Records at U. S. Penitentiary, Alcatraz, California, Indicate That Heinrich Roedel Is Not a Citizen of the United States.

Subscribed and sworn to before me this 31st day of January, 1950.

[Seal] /s/ P. J. MADIGAN,
Associate Warden,
Alcatraz, California.

Warden-Associate Warden authorized by the Act of February 11, 1948, to administer oaths.

[Endorsed]: Filed February 2, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing documents, listed below, are the originals filed in the above-entitled case, in this Court, and that they constitute the Record on Appeal herein, as designated by the Appellant, to wit:

Motion for Vacation of the Judgment and Sentence and to Quash the Verdict and Exhibits A, B, C and D.

Order Denying Motion to Vacate Judgment and Sentence.

Notice of Appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

Designation of Records on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 7th day of March, A.D. 1950.

C. W. CALBREATH,
Clerk,

[Seal] By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12507. . United States Court of Appeals for the Ninth Circuit. Heinrich Roedel, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed March 22, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 12507

HEINRICH ROEDEL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS AND DESIGNA-
TION OF CONTENTS OF RECORD ON
APPEAL

Appellant intends to rely upon the following points on appeal:

1. The indictment failed to inform the defendant (appellant) of the nature and cause of the accusation against him.
2. The evidence was insufficient to sustain a conviction against the defendant (appellant).
3. Appellant was not a member of the Storm Troopers and therefore such evidence was highly prejudicial and inadmissible.
4. Defendant (appellant) was deprived of his right to file a petition for a writ of certiorari, in short his counsel misrepresented the law governing the fine element under the Federal Rules of Criminal Procedure.

* * *

Appellant deems the entire records necessary for the consideration of this appeal:

1. Motion to vacate the judgment and sentence, etc.
2. Appellant Exhibit A, B, C, and D—annexed to above said motion to vacate.
3. Instructions given to the jury as originally given at trial.
4. Order denying said motion to vacate judgment and sentence.
5. Notice of appeal.
6. Designation of records.

Dated: This 15th day of March, 1950.

/s/ HEINRICH ROEDEL,
Box 651-P.M.B. Alcatraz, Calif., Appellant in propria persona.

Proof of Service

I, Heinrich Roedel, appellant in the above-entitled action, hereby certify that on the 15th day of March, 1950, I served a copy of the above Statement of Points and Designation of Contents of Record upon Mr. Frank J. Hennessey, United States attorney, Post Office Building, San Francisco, California, attorney for appellee, by having said copy deposited in the United States mail.

/s/ HEINRICH ROEDEL,
Box 651-P.M.B. Alcatraz, Calif., Appellant in propria persona.

[Endorsed]: Filed March 22, 1950.

No. 12,507

IN THE

United States Court of Appeals
For the Ninth Circuit

HEINRICH ROEDEL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

FRANK J. HENNESSY,

United States Attorney,

JOSEPH KARESH,

Assistant United States Attorney,

Post Office Building, San Francisco 1, California,

Attorneys for Appellee.

FILED

JUN 26 195

PAUL P. O'BRIEN

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No. 12,507

IN THE

**United States Court of Appeals
For the Ninth Circuit**

HEINRICH ROEDEL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

This is an appeal from an order of the United States District Court for the Northern District of California, Southern Division, hereinafter called the "Court below", denying appellant's motion to vacate the judgment and sentence heretofore imposed against him (Tr. 65). The Court below had jurisdiction of the motion to correct its judgment and sentence under the provisions of Title 28 U.S.C.A. Section 2255. This Honorable Court has jurisdiction to review the order of the Court below denying the motion herein under authority of said Title 28 U.S.C.A. Section 2255.

ORDER BELOW.

The order of the Court below, denying appellant's motion to vacate judgment and sentence, reads as follows:

"Inasmuch as the motion of the petitioner filed January 6, 1950, and the files and records of the case conclusively show that the petitioner is entitled to no relief, his motion to vacate judgment and sentence is hereby denied.

Dated: January 9, 1950.

/s/LOUIS GOODMAN,
U. S. District Judge.

[Endorsed]: Filed January 10, 1950." (Tr. 65.)

STATEMENT OF THE CASE.

Appellant, a German alien, was convicted on December 19, 1942, after trial by jury, of attempted sabotage in time of war,

Title 50 *U.S.C.A.* Section 102.

Thereafter, on appeal, his conviction was affirmed by this Honorable Court,

Roedel v. United States, 145 F. (2d) 819.

In the District Court and before this Honorable Court the appellant was represented by appointed counsel. Certiorari was not sought in the Supreme Court of the United States until after the time to file a petition for such a remedy had expired. Appellant blames counsel, contending that he gave him wrong advice as to the time in which a petition for writ of certiorari

could be filed in the Supreme Court. It is this contention which appellant unsuccessfully urged in the Court below in his motion to vacate the judgment and sentence, and which he now makes as his sole contention in this appeal. It might be added here that in his statement of points on appeal, appellant also attacked the sufficiency of the indictment, the sufficiency of the evidence, and the admissibility of certain evidence in the trial Court, but in his brief, as above indicated, he now relies solely on the contention that he was deprived of his right to file a petition for a writ of certiorari in the Supreme Court.

QUESTION.

Is appellant entitled to relief by way of motion to vacate judgment and sentence?

CONTENTION OF APPELLEE.

The answer to the above stated question is: No.

ARGUMENT.

The record of the trial Court and the record on appeal clearly indicate that distinguished counsel now deceased, James B. O'Connor, Esq., gave the defendant diligent and effective representation. Appellant now seeks to cast reflection upon his counsel, who, of

course, can now not speak for himself. In any event, appellant can cite no authority for the novel proposition which he advances. None of the cases which he cites are in point. The appellant's argument being so palpably without merit, appellee believes that it need say no more than did the Court below in its decision, which it now adopts *in toto* as its argument in this appeal.

CONCLUSION.

In view of the foregoing, it is respectfully urged that the order of the Court below denying appellant's motion to vacate judgment and sentence is correct, and should be affirmed.

Dated, San Francisco, California,
June 23, 1950.

Respectfully submitted,

FRANK J. HENNESSY,

United States Attorney,

JOSEPH KARESH,

Assistant United States Attorney,

Attorneys for Appellee.

No. 12,508

IN THE
United States Court of Appeals
For the Ninth Circuit

FRANCISCO BLANCO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

FRANK J. HENNESSY,
United States Attorney,

RUDOLPH J. SCHOLZ,

Assistant United States Attorney,
422 Post Office Building, San Francisco 1, California,
Attorneys for Appellee.

FILED

JUN - 8 1950

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No. 12,508

IN THE
United States Court of Appeals
For the Ninth Circuit

FRANCISCO BLANCO,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

STATEMENT OF CASE AND SOLE QUESTION INVOLVED.

Appellant alleges he suffered personal injuries as a result of a vehicle accident on May 20, 1948, on the island of Saipan, and that his injuries were caused by the negligence of an enlisted man of the United States Navy.

The Government's motion to dismiss was granted on the ground that the island of Saipan was a foreign country within the purview of the Federal Tort Claims Act, and that the said Act expressly excluded any action against the United States when the cause of action arose in a foreign country.

Hence the sole point on appeal is: "Was the island of Saipan a foreign country within the purview of the Federal Tort Claims Act?"

ADMINISTRATIVE DECISION.

The Secretary of State has administratively declared that Saipan is a foreign country, and if the Secretary of State does not know what is or is not territory of the United States, the political aspect of which is in his department under our system of government, then who is to determine it?

He states in a letter to the Attorney General, with which the appellant is conversant:

“Saipan is one of the former Japanese mandated islands in the North Pacific Ocean. Those islands were placed under the international trusteeship system of the United Nations by an agreement concluded between the United States and the Security Council of the United Nations. Under this agreement the United States acts as administering authority for the Trust Territory, which comprises the former Japanese mandated islands. The agreement came into force on July 18, 1947. The United States does not have sovereignty over Saipan by virtue of the trusteeship agreement. It is the view of the Department of State that Saipan is not a part of the United States, nor a territory or possession of the United States.”

It will be recalled that this Government is a member of the United Nations and bound by its treaties.

We believe the decision of the Department of State is not binding on this Court, but certainly it should be given great weight.

**MILITARY OCCUPATION DOES NOT MAKE IT
UNITED STATES TERRITORY.**

Mere military occupation or administrative occupation does not make a country part of the United States. If this is so, what about the western part of Germany, Italy, Belgium, Japan, the Philippines, etc.? They were all at one time occupied by our armed forces and they were under our administration. The western part of Germany and Japan still are. Yet it must be admitted that Japan, the western part of Germany, etc., are not a part of the United States, or its territory or possessions.

Striner v. United States, 77 F. Supp. 241, was an action under the Federal Tort Claims Act. Striner claimed jurisdiction because of our military occupation of Belgium. The Court held that the complaint did not state a cause of action, and that it had no jurisdiction because Belgium was a foreign territory within the purview of the Federal Tort Claims Act.

That Congress never intended this Act to apply to occupied areas such as Saipan, was recently demonstrated by it passing Private Law 396, 81st Congress—2d Session, Approved March 16, 1950. This Act compensated Mr. Findley for personal injuries caused his son by the operation of a Navy vehicle in Saipan. It seems obvious that Congress would not have passed such a private bill if the claim was within the purview of this Act. On the contrary, both the House and Senate Committees in reporting on this Private Law held that private relief was necessary.

WHAT LAWS GOVERN SAIPAN?

Saipan is presently administered by the United States Navy, and the laws, or probably more accurately, the rules, it promulgates govern the island. Congress passed no laws for Saipan; it has no legislature. The rules of the Navy are enforced by the Provost Marshal of the Navy.

If there is any law (in a judicial sense, not in its widest sense) that is applicable to Saipan, would it not be the Japanese law? Yet the United States definitely, under the Federal Tort Claims Act, decided that it would not be bound by any foreign laws.

In a footnote of *Spelar v. United States*, 338 U. S. 217, decided November 7, 1949, it is stated:

“Local laws must be pleaded since the Federal Tort Claims Act permits suits only where the United States, if a private person, would be liable * * * *in accord with the law of the place where the act or omission occurred.*” (Emphasis ours.)

See

62 *Stats.* 933, 28 U.S.C. Supp. II, Paragraphs 13, 16(b).

The Supreme Court further stated:

“* * * Congress was unwilling to subject the United States to liabilities depending upon the laws of a foreign power * * *. The present suit premised entirely on Newfoundland's law may not be asserted against the United States * * *.”

ADJUDICATED CASES UNDER THE FEDERAL TORT CLAIMS ACT.

There are numerous cases involving this Act and its exception relative to foreign territory. As far as we know, they all uphold the Government's position. We cite briefly some of them.

Brewer v. United States, 79 F. Supp. 406. In this case the Court held that Okinawa was a foreign territory, and torts arising in Okinawa were not cognizant under the Federal Tort Claims Act.

Dunn v. United States (D.C., N.D. Cal.), F. Supp. Here the Court held that Japan was a foreign country, regardless of the fact that it was occupied by the armed forces, and administered by the United States.

Brunell v. United States, 77 F. Supp. 68. In this action, precisely the same question was involved as in the present case before this Court, and the Court held that Saipan was a foreign territory.

United States, Petitioner, v. Lillian Spelar, as Administratrix of the Estate of Mark Spelar, Deceased, 338 U. S. 217, 70 S. Ct. 10 (supra). This case corrected its dicta (if it was) which misled a Circuit Court of Appeals to hold that the United States, by virtue of its ninety-nine year lease on property in Newfoundland, came within the purview of the Federal Tort Claims Act. It being a Supreme Court case, we believe it is controlling in the present case.

Celine Smith, etc. v. United States (D.C., N.D. Cal.), F. Supp., held that Saipan was a foreign territory. The Court stated:

“The conclusion is inescapable that Saipan is, and was, at the time the injury occurred, a ‘foreign country’ within the meaning of 28 U.S.C. 943(k). Obviously Saipan is not, and never has been, a component part, or political subdivision of the United States, or one of its possessions * * *.”

Other cases the Court may be interested in are:

Strineri v. United States, supra;

Fleming v. Page, 50 U.S. 603;

DeLima v. Bidwell, 182 U. S. 182.

ONLY CONGRESS CAN ADD TERRITORY TO THE UNITED STATES.

We believe that under our system of Government only Congress can add territory to the United States, but Congress has not added Saipan to the United States.

APPELLANT'S BRIEF.

The appellant has the burden of proof. He assumes this by starting with the following authorities: The Saturday Evening Post, “Howlin’ Mad” Smith, and the Encyclopedia Britannica. We doubt that these are legal authorities, but as long as they are cited, perhaps the writer, who was in the United States Army at Saipan, may state (at least it has the virtue of not being hearsay) that he does not agree with General Smith that the Marines won the war, and will state further that he does not see how Saipan could ever become a state. The fish in the sea, the

rain in the sky, the coral in the island, on which is some sugar cane, compose the main characteristics and product of this island. It is believed that it could not support itself in the status of a state either economically, politically, intellectually, or otherwise. The few Micronesian natives (approximately 600), who inhabit the island, live on fish and a few simple agricultural products, with extra culinary appeal to the appetite on feast days through the medium of a pig or two. They are, however, appealing in character.

Perhaps an interesting development in this case was the announcement by the United States Department of Defense on May 17, 1950, of a plan that has been drawn by which Okinawa, which like Saipan is under provisional United States trusteeship, will be leased by Japan to the United States for air field storage and anchorage purposes, and the Ryukyu Islands will be returned to Japanese sovereignty and American troops withdrawn. The Court, perhaps, can take cognizance of this through the doctrine of judicial notice.

The appellant admits that the island is administered by the United States (Navy) under a trusteeship. Does it not then conclusively follow that it is a foreign territory?

In appellant's brief (page 4) he further admits that the proposal that Saipan be made an "integral part of the United States" (as Guam) was rejected, and the clause stricken. Common sense dictates then that in such a case it must be agreed it is not part of the United States.

A foreign country, as Justice Frankfurter says, is not a fixed and inclusive meaning. A foreign country in the days of Chief Justice Marshall does not necessarily mean the same today, but the meaning of a foreign country by Congress in passing the Act (as set forth in the *Spelar* case) leaves no doubt in our opinion that Saipan, under this Act, is a foreign country.

No cases under the Federal Tort Claims Act are cited by the appellant to uphold his contention, and we can find nothing in the appellant's brief to change the prior decisions of the Court.

Dated, San Francisco, California,

June 2, 1950.

Respectfully submitted,

FRANK J. HENNESSY,

United States Attorney,

RUDOLPH J. SCHOLZ,

Assistant United States Attorney,

Attorneys for Appellee.

No. 12509

United States
Court of Appeals
For the Ninth Circuit.

THOMAS E. HAYES, on Behalf of Himself and
All Others Similarly Situated,
Appellants,
vs.

UNION PACIFIC RAILROAD CO., a Corpora-
tion, and DINING CAR EMPLOYEES UN-
ION LOCAL 372, a Voluntary Unincorporated
Labor Organization; JAMES G. BARKDOLL,
as District Director of Said Local 372 in the
District of Los Angeles, State of California,
Appellee.

Transcript of Record

Appeal from the United States District Court
Northern District of California,
Southern Division.

JUN 16 1950

No. 12509

United States
Court of Appeals
For the Ninth Circuit.

THOMAS E. HAYES, on Behalf of Himself and
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vs.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

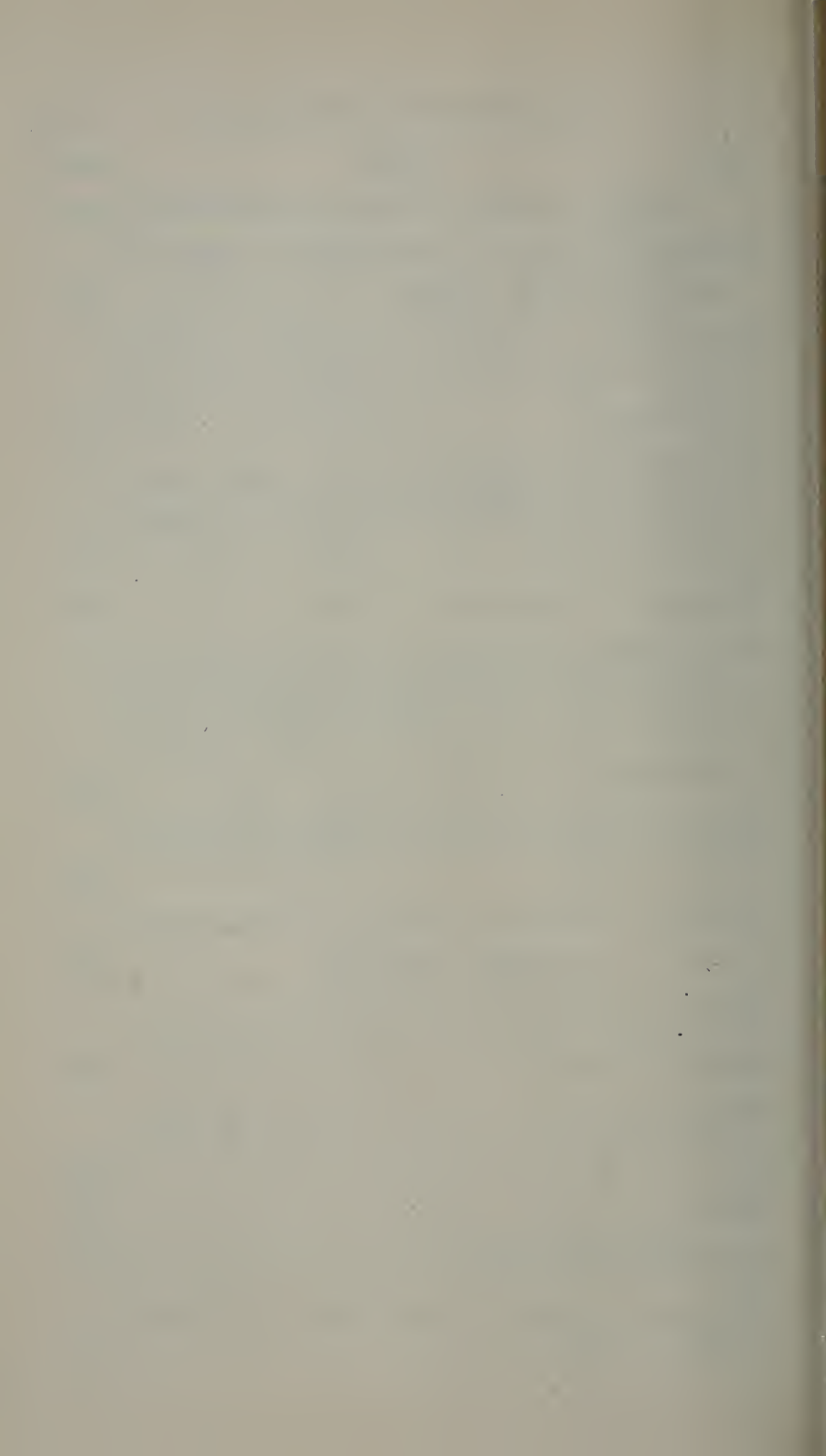
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NAMES AND ADDRESSES OF ATTORNEYS

GLADSTEIN, ANDERSEN, RESNER &
SAWYER,

240 Montgomery Street,
San Francisco, California,

Attorneys for Plaintiffs and Appellants.

T. W. BOCKES,
W. R. ROUSE,
ELMER COLLINS and
JAMES A. WILCOX,

1416 Dodge Street,
Omaha, Nebraska,

E. E. BENNETT,
EDWARD C. RENWICK,
MALCOLM DAVIS and
W. J. SCHALL,

422 West Sixth Street,
Los Angeles, California,

Attorneys for Union Pacific Railroad
Company, Defendant and Appellee.

BROBECK, PHLEGER and HARRISON,
MARION B. PLANT,

111 Sutter Street,
San Francisco, California,

Attorney for Dining Car Employees Union
Local 372, Defendant and Appellee.

In the District Court of the United States for the
Northern District of California, Southern Division

Civil No. 28990R

THOMAS E. HAYES, on Behalf of Himself and
All Others Similarly Situated, Who May Come
In and Prosecute This Action and Contribute
to the Costs Thereof,

Plaintiffs,

vs.

UNION PACIFIC RAILROAD CO., a Corporation,
and DINING CAR EMPLOYEES
UNION LOCAL 372, a Voluntary Unincorporated
Labor Organization; JAMES G. BARKDOLL,
as District Director of Said Local 372
in the District of Los Angeles, State of California,

Defendants.

COMPLAINT TO PREVENT, AND SECURE
DAMAGES FOR, UNLAWFUL DISCRIMINATION
UNDER THE RAILWAY LABOR
ACT

I.

Plaintiff named above brings this action on behalf of himself and on behalf of those persons whose names are set forth on Exhibit "A" attached hereto and made a part hereof, and on behalf of all other employees of defendant Union Pacific Railroad Co. (hereinafter referred to as "Railroad") similarly situated. Plaintiff and said

other persons and employees are hereinafter collectively referred to as "Plaintiffs."

II.

Plaintiffs bring this action (1) to prevent the discriminatory application by Defendants, solely because of the race of plaintiffs, of seniority rules so as to deprive plaintiffs of their rights to exercise seniority in accordance with the terms of a collective bargaining agreement between defendants, (2) to recover damages from defendants for such discriminatory application of seniority rules, and (3) for a declaration that the practices of defendants complained of herein are without warrant in law.

III.

Jurisdiction is conferred on the Court by §1337, 28 USCA (Judicial Code), giving the District Court original jurisdiction of any civil action arising under any act of Congress regulating commerce, and by §2 of the Railway Labor Act, 45 USCA §151(a).

IV.

At all the times herein mentioned defendant Railroad was and now is a corporation engaged in interstate commerce, organized under the laws of a state unknown to plaintiffs, and duly and regularly admitted to do business in the State of California as a foreign corporation; and defendant Dining Car Employees Union Local 372 (hereinafter referred to as "Union") was and is a voluntary non-incorporated association and labor organization

acting as the exclusive collective bargaining agent, pursuant to the terms and provisions of said Railway Labor Act, for plaintiffs and all other employees of Railroad engaged in dining car and commissary service, and functioning as such collective bargaining agent in the State of California and within the jurisdiction of this Court.

V.

The members of Union are too numerous to permit of bringing them all before the Court as defendants, and jurisdiction of the person of Union is conferred upon the Court by service of process upon a member and officer of Union, namely, James G. Barkdoll, District Chairman of Union for Los Angeles, California, District.

VI.

All of the plaintiffs are members of the Negro race and they are employees of the Railroad in its dining car and commissary service, or former employees of Railroad in said services who have, by reason of discriminatory practices by Railroad and Union, been deprived of their seniority rights and by reason thereof have either left or been discharged from their employment by Railroad, and plaintiffs at all times mentioned herein are either members of Union or former members thereof and entitled to representation by Union as their collective bargaining agent, without discrimination. As employees of Railroad, plaintiffs were at all times mentioned herein engaged in interstate commerce.

VII.

At all times herein mentioned there was and now is in full force and effect a written collective bargaining agreement (hereinafter called the "Agreement") executed by Railroad and Union effective June 1, 1942.

VIII.

In some instances plaintiffs had, prior to June 1, 1942, established an employment relationship with Railroad and were in such relationship on June 1, 1942, and the remainder of Plaintiffs have since June 1, 1942, established an employment relationship with Railroad in accordance with the terms of Part I, Article III, Rule 14, subdivision (a) of said Agreement; and at the time when said employment relationship was created, plaintiffs were and each of them was accorded a seniority date in accordance with the terms of Part I, Article IV, Rule 17 in the seniority group and class designated by Railroad at the time when the employment relationship was created.

IX.

During the time when the plaintiffs herein occupied an employment relationship with Railroad, they were by Railroad assigned to that certain seniority group known as Group B—Challenger runs, as defined in Part I, Article IV, Rule 19 of said Agreement, whereas white persons who were members of Union were, with the connivance of Railroad and Union, at the time when they estab-

lished an employment relationship, assigned by Railroad to seniority Group A—Standard dining car runs, as defined in said Rule 19.

Moreover, plaintiffs at the time they established their employment relationship were by Railroad and in connivance with Union, assigned to the third seniority class, to wit, second cooks, and coach buffet cooks, as defined in Part I, Article IV, Rule 20 of said Agreement, whereas the white members of said Union in the dining car service of Railroad were at the time their employment relationship was created, assigned by Railroad, in connivance with Union, either to Class I—Chef caterers, or Class II—chefs, as defined in said Rule 20, and by reason of the discriminatory treatment given to the said white members of the Union, their pay and allowances were materially larger than the pay and allowances of plaintiffs, although there was no distinction between the ability and competence of plaintiffs and said white members of Union.

X.

Under the terms of said Agreement, and particularly Part I, Article IV, Rule 17, subdivision (c), it was impossible for plaintiffs to obtain a seniority date and accumulate the seniority in a higher class than that to which they were assigned at the inception of their employment relationship, except in accordance with the terms of said Rule 17, which provides that an employee will be accorded a seniority date in a higher group or class

in which he has not previously acquired a seniority date only upon assignment by bulletin to a bulletin position or vacancy in such higher group or class and the seniority date so accorded will be the date of assignment and will also be accorded in all intermediate groups and classes, and an employee assigned to a position in a higher group or class will retain the seniority dates held in all lower groups and classes and continue to accumulate seniority therein. Railroad, in connivance with Union, has at all times within four years preceding the filing of this complaint refused to permit plaintiffs to acquire seniority either in Class I—Chef caterers, or Class II—Chefs, as defined in Part I, Article IV, Rule 20, or in Group A—Standard dining car runs, as defined in Part I, Article IV, Rule 19, by refusing to accept from plaintiffs bids for bulletin positions in higher groups and classifications to which they were entitled by reason of seniority, and which bulletined positions were filled, by Railroad in connivance with Union, by white members of Union having lesser seniority than plaintiffs.

XI.

Not only has Railroad, in connivance with Union, denied seniority rights to plaintiffs, as alleged in paragraph X hereof, but has at the same time employed plaintiffs in seniority Group A—Standard dining car runs, as defined in said Rule 19, and in Class I—Chef caterers, and Class II—Chefs, as defined in said Rule 20, but without, however, as-

signing to plaintiffs any seniority date in said groups and classes, and has thereby prevented plaintiffs from accumulating seniority in said groups and classes.

XII.

That said Agreement provided in Part I, Article V, Rule 26 thereof that promotion shall be based upon seniority, fitness and ability, fitness and ability being sufficient, seniority shall prevail; but with reference to these plaintiffs, Railroad, in connivance with Union, has denied plaintiffs seniority in higher classes and groups while at the same time has employed plaintiffs in such higher classes and groups for long periods of time without any criticism of their fitness and ability, and the reason for the said discrimination against plaintiffs was and is because they are Negroes, and it is and has been the purpose of Railroad and Union to drive plaintiffs and all other Negroes from service in the employment of Railroad in its dining car department, except in inferior groups and classes; and that this policy was devised and has been enforced with express malice against plaintiffs, and for the purpose of oppressing them.

XIII.

Union is controlled by persons wholly in sympathy with the said policy of discrimination against plaintiffs and, notwithstanding repeated protest by plaintiffs and their representatives, Railroad and

Union have failed, neglected and refused to refrain from said discriminatory practices, and plaintiffs have no administrative remedy save and except before such bodies of Union and Railroad as have already acquiesced in and perpetuated the said discriminatory practices; and without the interposition of this Court, and without the exercise of its equity jurisdiction in the premises, plaintiffs have no plain, speedy or adequate remedy at law.

XIV.

The employment records of plaintiffs are wholly within the possession and control of Railroad and without discovery of said records plaintiffs are unable to calculate and state the damages which they and each of them have suffered by reason of the aforesaid discriminatory practices within four years immediately preceding the filing of this complaint.

Wherefore, plaintiffs pray for the following relief:

(1) For declaratory judgment that the discriminatory practices herein set forth are illegal and a violation by Union of its responsibilities as sole collective bargaining agent for plaintiffs, and by Railroad of its obligation not to discriminate against plaintiffs by reason of race or color, and for an order according plaintiffs and each of them such seniority dates in such class or classes and group or groups as they would have been entitled

to had there been no discrimination against them by defendants.

(2) For a temporary restraining order, restraining Railroad and Union from engaging in discrimination in the application of seniority rules to plaintiffs until the further order of this Court.

(3) For an injunction pendente lite restraining Railroad and Union from engaging in discrimination in the application of seniority rules to plaintiffs until the further order of this Court.

(4) For a permanent injunction forever restraining Railroad and Union from engaging in discrimination in the application of seniority rules to plaintiffs.

(5) For a reference to a United States Commissioner or other authorized officer to take testimony and report to the Court upon the damages sustained by plaintiffs and each of them by reason of said discriminatory practices in the application of seniority rules to plaintiffs.

(6) For a judgment for such damages thus ascertained by said Commissioner or other authorized person.

(7) For a decree for punitive or exemplary damages on behalf of each of the plaintiffs entitled to recover herein in such amount as to the Court may seem appropriate.

(8) For costs of suit and disbursements incurred herein, together with interest on any damages allowed plaintiffs from the date when they

should have been accorded seniority rights under the terms of said Agreement, and for the allowance of a reasonable attorneys' fee.

(9) For such other and further relief as to this Court may seem meet and just in the premises.

Dated: July 1, 1949.

GLADSTEIN, ANDERSEN,
RESNER & SAWYER,

/s/ HAROLD M. SAWYER,
Attorneys for Plaintiffs.

EXHIBIT "A"

Alfred Allen, 2521 Blondo Street, Omaha, Nebraska

Lewis Ballard, 2214 North 26th Street, Omaha, Nebraska

Max D. Banks, 3027 R Street, Omaha, Nebraska

Bennie Bates, 2429 Parker Street, Omaha, Nebraska

Dewey Berry, 2760 Lincoln Avenue, Ogden, Utah

Henry Bradford, 1702 North 26th Street, Omaha, Nebraska

Clarence O. Buckner, 923 North 27th Street, Omaha, Nebraska

John Bukey, 1437 East 15th Street, Los Angeles 21, California

Richard Buntin, 2322 East 108th Street, Los Angeles 2, California

Henry Burnett, 703 East 42nd Place, Los Angeles, California

Horace Burnett, 703 East 42nd Place, Los Angeles,
California

Willie R. Burton, 1422 East 16th Street, Los Angeles 21, California

M. J. Clayton, 1328 West 37th Place, Los Angeles,
California

Tom D. Clerkley, 6541½ East 37th Street, Los Angeles, California

Raymond Corbin, 2618 N. 27th Street, Omaha 10,
Nebraska

Flenoid Cunningham, 2819½ Maple Avenue, Los Angeles, California

Ted Eaton, 546 East Jefferson Street, Los Angeles,
California

Albert L. Ellington, 2719½ North 24th Street,
Omaha, Nebraska

Robert M. Ewing, 3219 Corby Street, Omaha 10,
Nebraska

Leroy Fisher, 2875 Maple Street, Omaha, Nebraska

Waymon Fleming, 2807 North 24th Street, Omaha,
Nebraska

Freddie Franks, 1712½ Willis Avenue, Omaha,
Nebraska

Langston Gardner, 292 W. Claremont Street, Pasadena, California

Junior L. Gilreath, 2507 Patrick Avenue, Omaha,
Nebraska

Dennis Hall, 2511 Seward Street, Omaha, Nebraska

Edward W. Hamilton, 13402 Traub Avenue, Los Angeles, California

Elbert L. Holliday, 603 East 121st Street, Los Angeles, California.

Robert J. Ivory, 958 North 27th Avenue, Omaha, Nebraska

Luther W. Jackson, 788 East 40th Place, Los Angeles, California

Marion J. Johns, 2801 Charles Street, Omaha, Nebraska

Charles Johnson, 2726 Franklin Street, Omaha, Nebraska

Donald W. Johnson, 983 North 27th Street, Omaha, Nebraska

Edward M. Jones, 4323 Honderrass Street, Los Angeles, California

Theodore R. Jones, 640 East 118th Street, Los Angeles 2, California

Henry O. Jury, 5504 Morgan Street, Los Angeles, California

Leadis Kettor, 834 Fillmore Street, San Francisco, California

Edmond King, Jr., 3015 Pinkney Street, Omaha, Nebraska

L. A. King, 311 East 35th Street, Los Angeles, California

Robert Lillard, 2111 Grant Street, Omaha, Nebraska

John H. Lofton, 1201 North 26th Street, Omaha, Nebraska

Joel Manning, 217 West 43rd Street, Los Angeles 37, California

Osceala Manning, 131 East 60th Street, Los Angeles, California

Frederick J. May, 1230 $\frac{1}{2}$ East 56th Street, Los Angeles 11, California

Hayward Maynor, 654 $\frac{1}{2}$ East 37th Street, Los Angeles, California

Eugene McCarthy, 2769 Alcatraz, Berkeley, California

John L. Miller, 2844 Binney Street, Omaha, Nebraska

Walter M. Moore, 885 East Santa Barbara Avenue, Los Angeles, California

John W. Morgan, 2829 Decatur Street, Omaha, Nebraska

Richard O. Morrison, 3012 Miami Street, Omaha, Nebraska

Belford N. Moses, 120 West 58th Street, Los Angeles, California

Edgar Nelson, 2601 Wirt Street, Omaha, Nebraska

Leonard A. Nelson, 2601 Wirt Street, Omaha, Nebraska

Lawrence Nolbert, 1515 $\frac{1}{4}$ East 33rd Street, Los Angeles, California

Oliver E. Odom, 3771 Cimarron Street, Los Angeles, California

Charles N. Pankey, 3110 Corby Street, Omaha, Nebraska

William B. Regen, 501 East 46th Street, Los Angeles, California

Charles M. Renfro, 885 East Santa Barbara Avenue, Los Angeles, California

Leonard D. Riwers, 2608 Patrick Avenue, Omaha, Nebraska

Isiaiah Rivers, 2720 Miami Street, Omaha, Nebraska

Benjamin Robinson, 1151½ West 54th Street, Los Angeles, California

Harvey H. Robinson, 1370 East 42nd Street, Los Angeles, California

Frank Sanders, Jr., 2234 Ohio Street, Omaha, Nebraska

Thomas Savage, 1014 South 11th Street, Omaha, Nebraska

John J. Shanks, 312 East 42nd Place, Los Angeles, California

John A. Shaw, 2609 Hamilton, Omaha, Nebraska

French L. Spencer, 2876 Corby Street, Omaha 10, Nebraska

Albert E. Simpson, 159 East 54th Street, Los Angeles, California

Albert Smith, 232 West 47th Place, Los Angeles, California

Charles A. Smith, 318 East 29th Place, Los Angeles, California

Thomas R. Spikes, 1260 East 124th Street, Los Angeles, California

Vernon Stamps, 1342 West 35th Street, Los Angeles, California

Amos Stoner, 2233 Miami Street, Omaha, Nebraska

Willie M. Swanson, 5115 South Main Street, Los Angeles, California

Konwood Thomas, 2619 Decatur Street, Omaha, Nebraska

Vernell Thompson, 1025½ East 33rd Street, Los Angeles 11, California

Harvy H. Trammell, 4711 McKinley Avenue, Los Angeles, California

Robert C. Turner, 2875 Maple Street, Omaha, Nebraska

Livingston S. Vaughn, 1802 Lake Street, Omaha, Nebraska

Roscoe J. Vaughn, Jr., 285 F Ohio, Omaha, Nebraska

Jarome O. Watson, 2406 North 21st Street, Omaha, Nebraska

Henry D. Wiley, 2011 Miami Street, Omaha 10, Nebraska

J. M. Williams, 1130 East 58th Place, Los Angeles, California

Henry L. Williamson, 212 West 49th Street, Los Angeles, California

Chas. P. Westbrooke, 1447 East 52nd Street, Los Angeles, California

Charles Winston, 916 East 116th Street, Los Angeles, California

Elie Woods, Jr., 3206 Ellis Street, Berkeley, California

Pall E. Woods, 208 West 59th Place, Los Angeles, California

State of California,

City and County of San Francisco—ss.

Harold M. Sawyer, being first duly sworn, deposes and says:

That he is one of the attorneys for plaintiffs herein; that he makes this verification for and on

behalf of plaintiffs for the reason that none of the plaintiffs is at the present time in the county in which affiant has his office; that affiant prepared and read the within and foregoing complaint and knows the contents thereof; that the same is true of his own knowledge except as to matters therein stated upon information or belief, and as to those matters he believes it to be true.

/s/ HAROLD M. SAWYER.

Subscribed and sworn to before me this 6th day of July, 1949.

[Seal] /s/ AGNES GUAVE,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission Expires January 14, 1953.

[Endorsed]: Filed July 6, 1949.

[Title of District Court and Cause.]

AFFIDAVIT OF H. A. HANSEN

State of Nebraska,
County of Douglas—ss.

H. A. Hansen, being first duly sworn, on oath deposes and says that he is Manager of the Dining Car and Hotel Department of the Union Pacific Railroad Company, one of the defendants named in the above-entitled action, and makes this affidavit in support of the objections of defendant Union

Pacific Railroad Company to the plaintiff's interrogatories dated August 16, 1949:

Affiant states:

(1) That Flenoid Cunningham, Ted Eaton, Elbert L. Holliday, Frederick J. May, Lawrence Nolbert and Albert Smith, who are among those persons named in paragraph I of the amendment to the complaint dated August 12, 1949, as well as in Exhibit A attached to the original complaint in the above-named case, have never been employed by the Union Pacific Railroad Company in the craft or class known as "dining and cafe car cooks," also known as "kitchen employes on dining, cafe-lounge, cafe-club, cafe-observation, cafe and coach buffet cars" (hereinafter referred to as the "cook's craft"), in its dining car service at any time within the four-year period preceding the filing of the complaint in the above-named suit; that the said six above-named persons are employed by the Union Pacific Railroad Company as waiters, which is a class or craft wholly separate and distinct from the cook's craft, and that these six employes are not represented by the defendant Dining Car Employees Union Local 372, but by another separate and distinct union.

(2) That Horace Burnett, Leadis Kettor, William B. Regen Leonard D. Rivers, John J. Shanks and Pall E. Woods, who are among those persons named in paragraph I of the amendment to the complaint dated August 12, 1949, as well as Exhibit A attached to the original complaint in the above-named case, have never been employed by the Union Pacific Railroad Company in the cook's craft or in its dining car service and that although diligent search has been made no record of any employment in the dining car service with the Union Pacific Railroad Company, of said above-named persons has been found.

(3) That Lawrence Nelson, who is one of those persons named in paragraph I of the amendment to the complaint in the above-named case dated August 12, 1949, had not when the complaint was filed established an employment relation with the Union Pacific Railroad Company (as defined in Rule 14 of the agreement between the Union Pacific Railroad Company and Dining Car Employees Union Local 372, effective June 1, 1942, a copy of which is attached hereto and made a part hereof); in that he had not completed 90 days of continuous service with the Company as required by Rule 14(a) of said agreement.

(4) That Hurdo Longmire, who is one of those persons named in paragraph I of the amendment to the complaint in the above-named suit dated August 12, 1949, has had no employment with the Union Pacific Railroad Company in the cook's craft with-

in the four years preceding the date of the filing of the complaint in this action.

(5) That to develop and ascertain the information requested in the interrogatories dated August 16, 1949, served by the plaintiff in the above-named action, will require much detailed examination of numerous files and records, which fact is self-evident from the interrogatories themselves; that to furnish the information requested in interrogatory I, subdivisions (2) and (3), it will be necessary to locate and examine the individual time sheets of each person concerned for 96 semi-monthly pay roll periods and, in many cases, since such persons will have worked in more than one assignment during a single pay period, it will be necessary to recompute from such records the amount earned in each assignment; that it will also be necessary for each of the persons listed in all cases to compute back pay which was not indicated on current time rolls for certain retro-active pay increases which were given subsequent to the completion of said current pay rolls; that after all of the necessary detail work in locating and compiling the information necessary to respond to the said interrogatories has been completed, it will then be necessary to compile this information in presentable form and to carefully recheck the information; and that in order to answer and furnish all of the information requested in the interrogatories dated August 16, 1949, will require the work of 25 employees working for approximately 70 eight-hour days.

(6) That according to affiant's information and

belief, plaintiff Thomas E. Hayes has not been authorized to bring or maintain this action by all of the persons listed on Exhibit A attached to the original complaint herein or in paragraph I of the amendment to the complaint dated August 12, 1949; that the affiant has been advised either directly or indirectly by some of those persons listed on Exhibit A attached to the original complaint or in paragraph I of the amendment to the complaint dated August 12, 1949, that they have neither authorized nor approved the bringing of this suit allegedly on their behalf by plaintiff Hayes.

(7) That the allegations contained in the complaint in the above-entitled action that the defendant Union Pacific Railroad Company and Dining Car Employees Union Local 372 have discriminated because of the fact that said persons may be negroes, against plaintiff Thomas E. Hayes and those persons named in Exhibit A attached to the complaint or in paragraph I of the amendment to the complaint dated August 12, 1949, by allegedly preventing the said persons from exercising their seniority rights in accordance with the terms of the aforesaid agreement in an effort to drive all negroes employed in the cook's craft from the employ of the Union Pacific Railroad Company is wholly false and without any foundation in fact.

That there has been no discrimination because of race or color against any negro employee under the aforesaid agreement and this is demonstrated by the fact that 66 of those persons listed in Exhibit A attached to the complaint and 70 of those named

in paragraph I of the amendment to the complaint dated August 12, 1949, presently and did on the date the complaint was filed herein, hold seniority in group A and that 8 of said persons also hold seniority in group AA and that, in addition, 20 of said named persons hold seniority in the second seniority class known as chefs, all as defined in Rules 19 and 20 of the said agreement.

That as of the date complaint was filed in the above-named action, the following statement shows under classifications of white and colored the number of employes employed by the defendant Union Pacific Railroad Company in the classes and groups as indicated:

Cooks Holding Group AA and Group A Seniority As Of July 6, 1949

Chef-Caterers—Chefs		2nd Cooks		3rd Cooks		4th Cooks	
White	Colored	White	Colored	White	Colored	White	Colored
41	16	37	31	21	18	13	19

Cooks Holding Group A But Not Group AA Seniority As Of July 6, 1949

Chefs		2nd Cooks		3rd Cooks		4th Cooks	
White	Colored	White	Colored	White	Colored	White	Colored
37	61	19	53	11	56	9	65
Grand							
Total	77	56	84	32	74	22	84

Total:

White—188

Colored—319

There does exist a controversy between a small group of employes in the cook's craft and the remainder of the employes in the craft with respect to the application of seniority rights. Certain employes in the cook's craft whose seniority rights were first acquired in Group B, of whom the plaintiff Thomas E. Hayes is one, have made claim that the original date upon which they acquired seniority in Group B should apply also as their seniority in Group A retroactive to the date the seniority was acquired in Group B. Such action would adversely affect employes, both colored and white, holding seniority in Group A and violate said agreement effective June 1, 1942. The requested action is in effect a request for a change in the collective bargaining agreement. Affiant has been informed by the collective bargaining representative that the employees thus adversely affected are not agreeable to the requested action. Affiant further states that the controversy arising out of the aforesaid claim and disagreement between members of the cook's craft does not arise from any discrimination as between white and colored employees in the application of seniority rights.

/s/ H. A. HANSEN

Subscribed and sworn to before me this 26th day of August, 1949.

[Seal] /s/ LOUIS SCHOLNICK,

Notary Public in and for
said County and State.

[Endorsed]: Filed August 29, 1949.

[Title of District Court and Cause.]

AFFIDAVIT OF STEVEN R. AUGUSTON

Steven R. Auguston, being first duly sworn, deposes and says:

I am General Chairman and Secretary-Treasurer of Dining Car Employees Union, Local No. 372, one of the defendants in the above-entitled action, and have been an officer of said defendant at all times mentioned in the complaint.

The said defendant is a labor organization and was organized on July 20, 1933, for the purpose of representing for collective bargaining purposes certain employees of Union Pacific Railroad, including kitchen employees and bartenders on passenger trains operated by the said Railroad. The membership of said defendant Union has been and is comprised of employees of said Railroad, including kitchen employees and bartenders on passenger trains, and the said defendant at all times herein mentioned has been the collective bargaining representative under the Railway Labor Act of kitchen employees and bartenders employed on passenger trains operated by said Railroad.

The defendant Union does not include within its membership, and does not represent and has never included or represented, any employees on passenger trains other than kitchen employees and bartenders. Dining car stewards employed by the said Railroad are and have been represented by the Brotherhood of Railroad Trainmen; dining car

waiters and lounge car attendants employed by the said Railroad are and have been represented by Protective Order of Dining Car Waiters Local No. 465; employees in commissary offices and storerooms of said Railroad are and have been represented by the Brotherhood of Railway Clerks; and the defendant Union has never represented dining car stewards, dining car waiters, lounge attendants or employees in commissary offices and storerooms.

The defendant Union does not, and has not at any time mentioned in the complaint, discriminated in any way against negroes, but on the contrary admits negroes to its membership upon exactly the same terms and conditions, and accords them exactly the same rights and privileges, as white men, without any differentiation of any kind or nature between the two.

Of the members of the defendant Union employed on passenger trains, approximately 140 are negroes.

Of the defendant Union's four District Chairmen (the Union is divided into five Districts with a Chairman at the head of each District except the Portland District, where the General Chairman acts as Chairman of the District), two, namely, Ercil M. Orme, Chairman of the Denver District, and Fantley Jones, Chairman of the Ogden District, are negroes.

Among the Union's officers who negotiated and executed on its behalf the collective bargaining

agreement referred to in paragraph VII of the complaint were Ercil M. Orme and Fantley Jones, the two District Chairmen above mentioned. Said agreement secures to negroes exactly the same rights and privileges as white men and does not differentiate in any way between the two.

During the time mentioned in the complaint, vacant positions (including positions newly created) in the classifications represented by defendant Union have been filled by the defendant Railroad either by assigning thereto existing employees who apply therefor as provided in said agreement or, if no qualified employees apply therefor, by hiring new employees. Normally, existing employees apply for, and are assigned to any vacant positions (including positions newly created) in the higher seniority groups and classifications, and the only vacant positions for which new employees are hired are positions in the lower seniority groups and classifications for which no applications have been received from existing employees. The result is that almost all new employees are hired to fill positions in lower seniority groups and classifications, and this is true, and has been true at all times mentioned in the complaint, whether the new employees be white or negro. In the exceptional instances when the defendant Railroad has hired new employees to fill positions in the higher seniority groups and classifications, it has hired negro as well as white men to fill such positions. At all times mentioned in the complaint the seniority

group and classification of a new employee (including any new employees mentioned in the complaint) was determined automatically, and regardless of the race of such new employee, by the seniority group and classification of the position which such new employee was hired and employed to fill.

At no time mentioned in the complaint has the defendant Union had any voice or part whatever in the selection or hiring by the defendant Railroad of new employees, and if there has been any instance in which the defendant Railroad, in selecting and hiring a new employee, selected and hired a white man in preference to a negro, the defendant Union had no voice or part whatever in such selection or hiring.

At all times mentioned in the complaint, the promotion and assignment of employees to positions in higher seniority groups has been governed by said agreement regardless of race. It is false and untrue that plaintiff and other negroes have been confined to seniority Group B and the third seniority class and to lower seniority groups and classes, and have been denied seniority in Group A and in the first and second seniority classes. The fact is that plaintiff himself holds seniority in Group A, his seniority date in the Group A roster being July 7, 1948. Of the persons listed in the Exhibit attached to the complaint, 61 hold Group A seniority (their seniority dates on the Group A roster running back as far as the year 1916); 2 also hold seniority in Group AA, and 15 are employed in the

second seniority class (chefs). A true and correct statement of the seniority classifications and dates on the Group A and Group AA seniority rosters of said 61 persons is attached hereto as Exhibit A. Of the remaining persons listed in the Exhibit attached to the complaint, 6 have never been employed in any classification represented by defendant Union, but are employed as waiters and are represented by another union, 5 others are no longer employed by the defendant Railroad, and defendant Union has been unable to identify 6 others as ever having been employed by defendant Railroad, all as particularly appears in said Exhibit B hereto attached.

If defendant Railroad at any time mentioned in the complaint committed any act of racial discrimination in respect to any employee represented by defendant Union, defendant Union was and is unaware thereof. Neither plaintiff nor any other person at any time mentioned in the complaint called any such alleged act of discrimination to the attention of defendant Union, or made any request that defendant Union take action in respect thereto.

/s/ STEVEN R. AUGUSTON.

Subscribed and sworn to before me this 14th day of September, 1949.

[Seal] /s/ EUGENE P. JONES,
Notary Public.

EXHIBIT A

Name	Classification of Position	Group A Seniority Date
Thomas E. Hayes	2nd Cook	7- 7-48
Alfred Allen	2nd Cook	8- 5-47
Lewis Ballard	2nd Cook	9- 1-47
Max D. Banks	2nd Cook	5-23-46
Bennie Bates	2nd Cook	9- 1-47
Dewey Berry	4th Cook	11-25-44
Henry Bradford	3rd Cook	5- 9-45
Clarence O. Buckner	4th Cook	6-16-48
John Bukey	Chef	12-29-19
Richard Buntin	2nd Cook	6- 2-46
Henry Burnett		(No "A" Date)
Horace Burnett		(Not identified)
Willie R. Burton	3rd Cook	8-24-46
M. J. Clayton	Chef	6- 2-46
Tom D. Clerkley	4th Cook	6-16-48
Raymond Corbin	3rd Cook	9- 1-47
Flenoid Cunningham	<u>Waiter</u>	
Ted Eaton	<u>Waiter</u>	
Albert L. Ellington	4th Cook	(No Date)*
Robert M. Ewing	Chef	9- 1-47
Leroy Fisher	3rd Cook	7- 1-47
Waymon Fleming	4th Cook	7- 4-48
Freddie Franks	4th Cook	7- 4-48
Langston Gardner	2nd Cook	6- 2-46
Junior L. Gilreath	3rd Cook	9- 1-47
Dennis Hall	Chef	9- 1-47
Edward W. Hamilton	3rd Cook	"A" 6- 2-46
Elbert L. Holliday	<u>Waiter</u>	"AA" 6-12-47
Robert J. Ivory	4th Cook	5- 1-48
Luther W. Jackson	2nd Cook	1- 3-45

* First entered service June 1, 1949, and will not acquire seniority date until he has had ninety days' service.

Name	Classification of Position	Group A Seniority Date
Marion J. Johns	3rd Cook	9- 1-47
Charles Johnson		(No "A" Date)
Donald W. Johnson	4th Cook	7-22-47
Edward M. Jones	Chef	8- 5-16
Theodore R. Jones	Chef	6- 2-46
Henry O. Jury	2nd Cook	6- 2-46
Leadis Kettor		(Not identified)
Edmond King, Jr.	3rd Cook	5- 3-46
L. A. King	2nd Cook	6-13-46
Robert Lillard		(No longer Employed)
John H. Lofton		(No longer Employed)
Joel Manning	4th Cook	6- 2-46
Osceala Manning	4th Cook	6- 2-46
Frederick J. May	<u>Waiter</u>	
Hayward Maynor	3rd Cook	6- 2-46
Eugene McCarthy	3rd Cook	(No "A" Date)
John L. Miller		(No "A" Date)
Walter M. Moore	3rd Cook	6- 2-46
John W. Morgan	4th Cook	5-23-46
Richard O. Morrison	4th Cook	9- 1-47
Belford N. Moses	2nd Cook	6- 2-46
Edgar Nelson	4th Cook	10- 8-47
Leonard A. Nelson		(No longer Employed)
Lawrence Nolbert	<u>Waiter</u>	
Oliver E. Odom	Chef	6- 2-46
Charles N. Pankey	Business Car Chef	(No "A" Date)
William B. Regen		(Not identified)
Charles M. Renfro	2nd Cook	6- 2-46
Leonard D. Riuers		(Not identified)
Isiaiah Rivers		(No "A" Date)
Benjamin Robinson	Chef	6- 2-46
Harvey H. Robinson	Chef	6- 2-46
Frank Sanders, Jr.	4th Cook	7- 4-48
Thomas Savage	2nd Cook	9-23-44
John J. Shanks		(Not identified)
John A. Shaw	4th Cook	6-15-48
French L. Spencer	Business Car Chef	(No "A" Date)

Name	Classification of Position	Group A Seniority Date
Albert E. Simpson	4th Cook	"A" 5-20-46
Albert Smith	<u>Waiter</u>	"AA" 5-19-47
Charles A. Smith	4th Cook	6- 2-46
Thomas R. Spikes	Chef	6- 2-46
Vernon Stamps	2nd Cook	10-10-45
Amos Stoner		(No longer Employed)
Willie M. Swanson	4th Cook	6- 2-46
Kenwood Thomas	4th Cook	12- 9-47
Vernell Thompson	4th Cook	3-19-46
Harvy H. Trammell	4th Cook	6- 2-46
Robert C. Turner	3rd Cook	7-19-48
Livinston S. Vaughn		(No "A" Date)
Roscoe J. Vaughn, Jr.	4th Cook	9- 1-47
Jarome O. Watson	4th Cook	7- 7-48
Henry D. Wiley		(No longer Employed)
J. M. Williams	3rd Cook	6- 2-46
Henry L. Williamson	Chef	6- 2-46
Chas. P. Westbrooke	Chef	6- 2-46
Charles Winston	Chef	6- 2-46
Elie Woods, Jr.	3rd Cook	9- 1-47
Pall E. Woods		(Not identified)

Receipt of copy acknowledged.

[Endorsed]: Filed September 14, 1949.

[Title of District Court and Cause.]

MOTIONS TO DISMISS, TO STRIKE, TO SEVER CLAIMS AND FOR A DEFINI- TIVE STATEMENT

The defendant Dining Car Employees' Union
Local 372 moves the Court as follows:

1. To dismiss the action because the complaint fails to state a claim against the said defendant upon which relief can be granted.

2. To dismiss the action because of lack of jurisdiction over the subject matter.

3. To dismiss the action because it is not maintainable as a class action under Rule 23 of the Rules of Civil Procedure, or otherwise.

4. To dismiss the action as to the persons named as additional parties plaintiff in the Amendment to Complaint and as to each of them because none of them has applied for or obtained leave to intervene as a party plaintiff.

5. To dismiss the action because the persons named as parties plaintiff in the Amendment to Complaint may not join in one action as plaintiffs under Rule 20 of the Rules of Civil Procedure, or otherwise.

6. To dismiss the action upon the ground that the claims of several persons named as parties plaintiff in the Amendment to Complaint may not be joined in a single action under Rule 18 of the Rules of Civil Procedure, or otherwise.

7. To dismiss the action as to persons named as additional parties plaintiff in the Amendment to Complaint because such persons have not authorized suit to be brought in their name or in their behalf.

8. To strike the Amendment to Complaint because it was filed without leave and because it names

as additional parties plaintiff persons who have not applied for or obtained leave to intervene as such, and attempts to state claims in their behalf.

9. To sever the claims of several parties plaintiff because they are misjoined.

10. To strike paragraph I of said complaint and Exhibit A attached to said complaint because the action is not maintainable as a class action and the said portions of the complaint are immaterial and impertinent.

11. For a more definite statement because the complaint is so vague and ambiguous that the said defendant cannot reasonably be required to frame a responsive pleading. The defects complained of and the details desired are as follows:

(a) The complaint alleges that the persons named as plaintiffs are either employees or former employees of the defendant Railroad, but does not state with respect to any particular plaintiff whether he is or is not an employee of the defendant Railroad. The defendant Union desires a statement with respect to each plaintiff as to whether he is or is not an employee of the defendant Railroad.

(b) The complaint alleges that the persons named as plaintiffs are either members of the defendant Union or former members thereof, but does not state with respect to any particular plaintiff whether or not such plaintiff is a member of the Union at the present time. Defendant Union de-

sires a statement with respect to each plaintiff as to whether or not such plaintiff is a member of the Union.

(c) The complaint alleges that the defendant Railroad has refused to accept from the plaintiffs bids for Bulletin positions in higher groups than Group B and in higher classes than class 3, but does not state with respect to any plaintiff when any bid for a position in a higher group and classification was made or rejected and does not identify the position for which the bid was made. The said defendant desires a statement from each plaintiff setting forth each instance in which he bid for a Bulletin position in a group higher than B or in a classification higher than the third, identifying the position for which the bid or application was made, furnishing the date of the bid or application and furnishing such other information as may be necessary to enable the said defendant to identify the said incident and to admit or deny the same.

(d) The complaint alleges that the plaintiffs have been employed in seniority Group A and in classes 1 and 2 without being assigned seniority dates in such groups and classes, but does not state when or where any particular plaintiff was so employed and does not identify the position in which he was so employed. The said defendant desires a statement from each plaintiff stating when and where he was employed in seniority Group A or in classifications 1 or 2, identifying the positions in

which he was so employed and supplying such other information as may be necessary to enable the said defendant to identify the incident and to admit or deny the same.

(e) The complaint alleges in paragraphs IX, X, XI and XII that certain alleged acts of the defendant Railroad mentioned in said paragraphs were done with the "connivance" of the defendant Union, but does not state what wrongful act or acts the defendant Union is complained to have committed and does not state how or in what manner the defendant Union is claimed to have connived. The defendant Union desires from each plaintiff a definite statement of the wrongful act or acts which the defendant Union is claimed to have committed in respect to such plaintiff and a definite statement of when, how and in what manner the defendant Union is claimed to have connived with the defendant Railroad.

(f) The complaint refers to repeated protests by plaintiffs and their representatives, but it does not state by what person or to what person any such protest was made and does not state when or in what manner any such protest was made. The defendant Union desires a definite statement identifying the person or persons by whom each such protest was made, identifying the person or persons to whom each such protest was made and stating when and where each such protest was made.

12. To dismiss the action upon the ground that

suit cannot be maintained against said defendant by its members for the reason that such suit represents an attempt by plaintiffs to sue themselves.

BROBECK, PHLEGER &
HARRISON,

/s/ MARION B. PLANT,
Attorneys for defendant Dining Car Employees
Union Local 372.

To Messrs. Gladstein, Andersen, Resner & Sawyer
and Harold M. Sawyer, Attorneys for Plain-
tiffs:

Please Take Notice, that the undersigned will bring the above Motion on for hearing before the above-entitled Court in the Courtroom of the Honorable Michael J. Roche, District Judge, in the Post Office Building, City and County of San Francisco, State of California, on Monday, September 26, 1949, at the hour of 10 o'clock a.m. of said day, or as soon thereafter as counsel can be heard.

BROBECK, PHLEGER &
HARRISON,

/s/ MARION B. PLANT,
Attorneys for defendant Dining Car Employees
Union Local 372.

Service of copy acknowledged.

[Endorsed]: Filed September 14, 1949.

[Title of District Court and Cause.]

MOTION TO DISMISS FOR MORE DEFINITE
STATEMENT AND TO STRIKE

The defendant Union Pacific Railroad Company moves the Court as follows:

(1) To dismiss the action as to defendant Union Pacific Railroad Company on the ground that the Court does not have jurisdiction of the subject matter because

(a) it appears from the complaint that the action does not arise under the Railway Labor Act, an act regulating commerce which is the ground of jurisdiction relied upon, and

(b) the allegations in the complaint that this defendant has discriminated against the plaintiff, Thomas E. Hayes, and other colored persons employed by it as dining car cooks, because of their race in the application of seniority rights, either alone or in connivance with defendant Union, are not true and are not made in good faith, but on the contrary are made with the purpose of imposing on the jurisdiction of this court.

(2) (a) To dismiss the action as a class action on the ground that the complaint does not allege facts which are required by Rule 23 of Federal Rules of Civil Procedure as a foundation for a class action, and it affirmatively appears from the affidavits in support of this motion that plaintiff Thomas E. Hayes is not such a person as will fairly

insure the adequate representation of all colored persons employed as dining car cooks by defendant Union Pacific Railroad Company; or

(b) in the alternative, to dismiss the action as to all persons on whose behalf the action is brought who are not permitted to intervene in the action as parties plaintiff within some reasonable period to be fixed by the Court.

(3) To dismiss the action as to each person named as plaintiff in the Amendment to Complaint who has not authorized the bringing of this action on his behalf.

(4) To dismiss the action on the ground that there is an administrative remedy under the Railway Labor Act available to the plaintiffs which plaintiffs should resort to in lieu of seeking relief in Court.

(5) To dismiss the action on the ground that the complaint fails to state a claim upon which relief can be granted.

(6) That plaintiff be required to make a more definite statement on the ground that the complaint is so vague and ambiguous that this defendant cannot be required to frame a responsive pleading for the following reasons:

(a) the complaint fails to allege the facts required by Rule 23 which justify the bringing of a class action. The complaint should state the question of law or fact which is common to the several

rights asserted, the nature and extent of the class represented, whether the class includes all dining car cooks employed by defendant Railroad and facts showing that plaintiffs will fairly insure the adequate representation of the class;

(b) the complaint does not allege the terms of the collective bargaining agreement of June 1, 1942, which have been violated by the conduct alleged in paragraphs IX, XI and XII of the complaint;

(c) the complaint does not allege what efforts, if any, have been made by the plaintiffs to seek relief through the administrative remedy provided by the Railway Labor Act nor does the complaint state facts showing such remedy to be inadequate;

(d) the complaint does not allege facts showing that plaintiffs have no adequate remedy at law justifying the injunctive relief sought;

(e) the complaint does not allege the existence of a controversy nor the contentions of the opposing parties with respect thereto, as to which plaintiffs seek a declaratory judgment;

(f) the complaint does not allege the manner in which plaintiffs have been damaged, the time when the seniority rights of each plaintiff arose, the time when and the circumstances under which the seniority rights of each plaintiff was violated and whether or not the plaintiffs seek damages against all of the defendants or only some of them.

(7) That the Court make an order striking:

(a) the Amendment to Complaint dated August 12, 1949, on the ground that it was filed for the sole purpose of adding parties plaintiff without order of Court in violation of the provisions of Rules 21 and 24 of Federal Rules of Civil Procedure, or

(b) in the alternative, that the names of all plaintiffs other than Thomas E. Hayes be stricken from the complaint on the ground that the complaint does not state facts which justify the joinder of such persons as parties plaintiffs under Rule 20 of the Federal Rules of Civil Procedure;

(c) the provisions of paragraph 8 of the prayer requesting allowance of reasonable attorneys' fees and the paragraph 7 thereof requesting punitive damages on the ground that such fees and damages are not recoverable in this action.

Dated: September 9, 1949.

T. W. BOCKES,
W. R. ROUSE,
ELMER COLLINS,
JAMES A. WILCOX,
E. E. BENNETT,
EDWARD C. RENWICK,
MALCOLM DAVIS,
W. J. SCHALL,

By /s/ EDWARD C. RENWICK,
Attorneys for Defendant Union Pacific Railroad
Company.

To Messrs. Gladstein, Andersen, Resner & Sawyer
and Harold M. Sawyer, Attorneys for Plain-
tiffs:

Please Take Notice, that the undersigned will
bring the above Motion on for hearing before the
above-entitled Court in the Courtroom of the Hon-
orable Michael J. Roche, District Judge, in the
Post Office Building, City and County of San Fran-
cisco, State of California, on Monday, September
26, 1949, at the hour of 10 o'clock a.m. of said day,
or as soon thereafter as counsel can be heard.

T. W. BOCKES,
W. R. ROUSE,
ELMER COLLINS,
JAMES A. WILCOX,
E. E. BENNETT,
EDWARD C. RENWICK,
MALCOLM DAVIS,
W. J. SCHALL,

By /s/ EDWARD C. RENWICK,
Attorneys for Defendant Union Pacific Railroad
Company.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Septemer 15, 1949.

[Title of District Court and Cause.]

AFFIDAVIT OF H. I. NORRIS

State of Nebraska,
County of Douglas—ss.

H. I. Norris, being first duly sworn, on oath deposes and says that he is Assistant Manager of the Dining Car and Hotel Department of the Union Pacific Railroad Company, one of the defendants named in the above-entitled action, and makes this affidavit in support of motion of said defendant Union Pacific Railroad Company to dismiss the complaint filed herein.

Affiant states:

(1) That throughout this affidavit the defendant Union Pacific Railroad Company is referred to as "Company"; the defendant Dining Car Employees Union Local No. 372 is referred to as "Union"; the craft or class known as "dining and cafe car cooks," also known as "kitchen employes on dining, cafe-lounge, cafe-club, cafe-observation, cafe and coach buffet cars," is referred to as the "cook's craft"; and the collective bargaining agreement dated June 1, 1942, between the Company and the Union, which is the collective bargaining representative under the Railway Labor Act for the Company's employes in its cook's craft, is referred to as the "agreement."

(2) That the agreement between the Company and the Union sets forth in Part I, Article IV,

Rules 19 and 20 certain seniority groups and classes which are found in the cook's craft as follows:

"Rule 19. Seniority Groups. Seniority groups shall be as follows:

"Group AA—Selective Runs.

"Group A—Standard Dining Car Runs.

"Group B—Challenger Runs.

"Groups C—Cafe-Lounge, Cafe-Observation and Cafe Car Runs."

"Rule 20. Seniority Classes. Seniority classes shall be as follows:

"1. Chef-Caterers.

"2. Chefs.

"3. Second Cooks and Coach Buffet Cooks.

"4. Third Cooks, Dish-Up Men and Cafe Car Cooks.

"5. Fourth Cooks and Coach Buffet Cook's Helpers."

Briefly, the essential duties in the various classes in all groups are as follows:

(a) Fourth cooks and coach buffet cook's helpers are a class of employees who usually are employed without previous cooking experience. Their duties generally are to wash dishes and cooking utensils, dispose of refuse, clean up the cooks' compartment of the dining car and assist with any task in the kitchen assigned to them.

(b) Third cooks, dish-up men and cafe car cooks clean and prepare vegetables for cooking,

make coffee under supervision of the chef, maintain steam table and other service facilities in the cooks' compartment and when meals are served dish up the vegetables and pass out the food orders to the waiters, and to the extent of time available assist the second cook in his duties.

(c) Second cooks and coach buffet cooks prepare and cook all fried foods such as meat, fish, eggs and potatoes, make pies, griddle cakes, hot breads such as muffins and do the general range work incidental to meal service, supervise the cooking of vegetables and clean out and maintain the food storage lockers assigned to them and assist the chef in the performance of his duties.

(d) Chefs are in complete charge of the dining car kitchen under the supervision of the steward. The chef is directly responsible for the ordering, use and disposition of all kitchen supplies and all kitchen employes report directly to the chef. He cuts and prepares for cooking all fresh meats and cooks and serves all meats except those cooked and served by the second cook, which are under the chef's supervision. He personally handles all items prepared and served from the charcoal broilers and items roasted in the ovens except those prepared under his direction by the second cook. In addition, he prepares all soups and sauces with the assistance of the second cook, and he plans the menus in conjunction with the dining car steward.

(e) The chef-caterer, who is employed only on Group AA—Selective Runs where chefs are not employed, performs the same duties as those performed by chefs in Group A standard runs except that the duties of the chef-caterer involve the handling of a wider variety of foods because of the higher type of dining car service afforded on those runs, which is explained in detail in item (4) hereof. The complete duties of all employes in the cook's craft are set forth in detailed instructions which are given to all employes in the cook's craft.

(3) As indicated in Rules 19 and 20, the seniority groups are classified according to the type of train operated and seniority classes are the various job classifications in the cook's craft. Each of the seniority groups listed in Rule 19 has within such group each of the seniority classes listed in Rule 20, except that the first class covering Chef-Caterer is found only in Group AA (Selective Runs). Different rates of pay apply in the various groups and in the various classes within each group. The highest paid position is that of Chef-Caterer in Group AA (Selective Runs), the rate as of the date hereof being \$344.00 per month, and the lowest paid positions are those of Coach Buffet Cook's Helpers found in Groups AA and C and Fourth Cooks found in Groups AA, A and B, the rate as of the date hereof being \$236.40 per month. Progression from the lower seniority classifications in any particular seniority group is the result of experience and training received on the job by the

incumbents of the lower-rated classes and the acquisition of seniority in the group.

(4) The dining car service on the Company's trains varies in accordance with the class of train operated. For example, on the Company's streamline trains (Seniority Group AA—Selective Runs), the quality of the dining car service furnished is of the highest and the menu affords a very wide selection, all of which requires that the chefs and cooks employed on those trains have the highest training and experience. On the standard dining car runs (Seniority Group A), the dining car service furnished is not of such high and extensive caliber and quality as found on the streamline trains, with the result that the cooks and chefs on such trains need not be as highly qualified as those found on the Group AA trains. The kind and quality of dining car service furnished on Group B, or Challenger, dining car runs, during the period that the Company operated the Challenger trains, was quite limited in variety and designed to afford meals at lowest possible prices. The type and variety of the food served on the Group C, or cafe-lounge, coach buffet and cafe car, runs is even more limited than that available on the Group B, or Challenger, dining car runs. The preparation necessary to serve the food on the Group C runs is necessarily limited in scope, resulting in less experience being required on the part of the cooks and chefs in this group. The highest trained class of cooks and chefs were and are necessarily employed in the higher groups of dining car service.

(5) The Company in operating its dining car service and in filling the superior positions in its cook's craft has operated on the principle of promoting qualified employes to the superior positions on the basis of seniority, fitness and ability and, except as to positions in Group AA—Selective Runs, seniority governs promotions where fitness and ability are sufficient, as provided in and uniformly applied under Part I, Article V, Rule 26 (a) of the agreement, which is quoted herein in item (9). This is soundly premised on the needs of the service, which necessarily dictates that better qualified employes be assigned to the superior positions. By virtue of this fact new employes without regard as to whether they are colored or white are generally first employed in the inferior groups and classes.

(6) During the four-year period preceding July 6, 1949, employes in the cook's craft have been promoted to all groups and classes from the lower groups and classes, and this is true both as to colored cooks and white cooks. More colored persons have been employed in the various classes and groups comprising the cook's craft during the four-year period immediately preceding the filing of the complaint in the above-entitled action than white persons. During the period commencing January 1, 1945, and ending July 6, 1949, the Company hired 2737 persons as employes in the cook's craft. Of this number 953 were white persons and 1784 were negroes. Since, as pointed out above, the superior

chefs' and cooks' positions are filled, as vacancies occur, by promoting, upon appropriate bulletin and bid, those qualified employes in the lower seniority groups and classes, without regard to the employes' race or color, and since the greater proportion of new employes hired are negroes, the Company's purpose is not that of driving all negroes from its service or to oppress them or force them to remain in inferior seniority groups and classes.

(7) As provided in Rule 22 (a) quoted herein in item (9), all non-temporary positions in the cook's craft are filled pursuant to appropriate bulletins which are issued by the Company. Those employes who desire to be considered for assignment to the positions bulletined submit applications therefor in writing. These are sometimes referred to as "bids" and are filed with the Company officer whose name is signed to the bulletin. This application must be made within ten days from the date of the bulletin and an assignment to the position bulletined will be made within twenty days from the same date. The foregoing is more particularly set forth in Part I, Article V, Rule 22(b), reading as follows:

"(b) An employe desiring a bulletined position must file written application with the officer whose name is signed to the bulletin within ten days from the date of bulletin and an assignment shall be made within twenty days from date of bulletin. An employe applying for more than one vacancy or new position bulletined at the same time must indicate preference."

Rule 26(a) quoted herein in item (9), as uniformly applied to all employees, both white and colored, in the cook's craft, has governed in the assignments to the positions bulletined.

The Company has in all instances given consideration to bids from any of its employees on any position bulletined. All bids received are considered in making assignment to the bulletined position and no colored employee who has submitted a bid for a bulletined position has been denied assignment to a position to which he was entitled under the provisions of the agreement as uniformly applied to both colored and white employees.

(8) There is no provision in the agreement which provides for a different application of its terms to white employees than to colored employees. It does not discriminate in any way against any employees because of their race or color. Further, in the application of the agreement it has been applied uniformly to white and colored employees in the various groups and classes, no preference being given to white employees over colored employees.

(9) The agreement provides that positions in the cook's craft other than temporary will be filled after bulletin has been posted and eligible employees have submitted bids in accordance with the provisions of Rule 22(a) and Rule 26(a) of the agreement, reading:

“Rule 22. Bulletining Positions. (a) All new positions or vacancies shall be promptly bulletined

on bulletin boards at all terminals affected. Positions of thirty days or less duration shall be considered temporary and may be filled without bulletining. Positions or vacancies of indefinite duration and/or known to be of more than thirty days duration shall be bulletined as temporary positions and again bulletined as soon as known to be permanent."

"Rule 26. Promotion. (a) Promotion shall be based upon seniority, fitness and ability; fitness and ability being sufficient, seniority shall prevail, except that fitness and ability shall govern assignments to selective runs, Group AA."

(10) Seniority in the cook's craft is acquired under the agreement and a seniority date accorded in the particular group and class in which the employe first completes 90 days of continuous service. A seniority date is accorded in all lower classes and all lower groups corresponding with the date seniority is acquired in a higher group. Rules 17(a) and (b) of the agreement set out with particularity the manner in which seniority is first acquired in the various groups and classes. Those rules read:

"Rule 17. Seniority Dates. (a) An employe will be accorded a seniority date only upon acquiring an employment relation in accordance with the provisions of Rule 14 of this Part I, and can retain the seniority date so accorded only during the retention of such employment relation. No employe may be accorded seniority date on more than one local district seniority roster at the same time.

Where two or more employes enter upon their duties at the same hour on the same day, the employing officer shall at that time designate their respective rank.

“(b) The seniority date accorded an employe acquiring an employment relation after the effective date of this agreement shall be the date on which the ninety days of continuous service required by the provisions of section (a) of Rule 14 of this Part I commenced. Such date will be accorded in the seniority class and group in which such ninety days of continuous service is completed, in all lower classes in that group, and in all corresponding and lower classes in all lower groups.”

(11) An employe who has once established an employment relationship and has been accorded a seniority date in the cook's craft can acquire seniority in a higher group and class only by assignment by bulletin to a bulletined position or vacancy in such higher group and class. This is set out with particularity in Rule 17(c) of the agreement, reading:

“(c) An employe will be accorded a seniority date in a higher group or class in which he has not previously acquired a seniority date only upon assignment by bulletin to a bulletined position or vacancy in such higher group or class. The seniority date so accorded will be the date of assignment and will also be accorded in all intermediate groups and classes. An employe assigned to a position in a higher group or class will retain the seniority

dates held in all lower groups and classes and continue to accumulate seniority therein."

The foregoing rules for acquiring seniority are not applicable to employment in temporary positions or vacancies. Such positions may be filled without bulletin in accordance with provisions of Rule 22(a) quoted in item (9) herein. When an employe from a lower group and class is temporarily filling a position in a higher group and class seniority therein is not acquired, since by the provisions of Rule 17(c) hereinabove quoted seniority can be acquired only by assignment to a bulletined position. This rule applies and has been applied uniformly to both colored and white employes.

There has never been an instance under the agreement where an employe was assigned by bulletin to a bulletined position in a higher group and class than which he held seniority at the time the bulletin was issued who has not been accorded seniority in such higher seniority group and class at the time assigned thereto.

(12) The agreement does not in any way restrict the Company in the operation of its dining car service, and the Company may as it sees fit establish or discontinue such dining car runs as it alone may determine. This is recognized by the provisions of paragraph (b) of Rule 2, Article II, Part I of the agreement, reading:

"(b) Dining car runs as listed herein are subject to discontinuance and change to meet changes in dining car or train service."

This is also recognized in Part I, Article V, Rules

24(a) and (b), which provide for the exercise of seniority on a system basis when regular established runs are abolished. Those rules read as follows:

“Rule 24. Exercise of Seniority—System Seniority District. (a) System seniority may be exercised only by the regularly assigned incumbents of positions on regular established runs (not including seasonal or extra runs) which are abolished, who are unable, in the exercise of their seniority, to hold in any group in their local seniority district a position in the seniority class in which they were employed at the time the run was abolished.

“(b) An employe eligible to exercise system seniority, in accordance with section (a) of this Rule, may displace only the junior regularly assigned employe in the lowest seniority group on the system roster of the class in which the employe was working at the time the run was abolished.”

(13) In 1935 the Company commenced the operation of what was known as its “Challenger” trains, i.e., “Los Angeles Challenger,” and “San Francisco Challenger.” The dining cars on the “Los Angeles Challenger” were operated between Los Angeles and Omaha, with home terminal for the crew members of the cook’s craft to be at Los Angeles, and the dining cars on the “San Francisco Challenger” were operated between Omaha and Ogden, with home terminal at Omaha.

Those trains provided, as I have stated heretofore, limited dining car service consisting of low-priced meals.

Seniority Group B (Challenger dining car runs)

was agreed upon between the Company and the Union as the seniority group applying to this class of service, in the same manner as Seniority Group AA was established to apply to the class of service on the streamline trains and Seniority Group A was established to apply to the class of service on the standard dining car runs.

In June, 1946, post war train service was established which involved expansion of the Los Angeles-Chicago and San Francisco-Chicago passenger train service. The dining cars operating on the Los Angeles Limited (dining car service manned by Group A employes) were extended to operate between Los Angeles and Chicago and a new train known as the "Transcon" (dining car service also manned by Group A employes) was established operating dining car service between Los Angeles, California, and North Platte, Nebraska.

At the same time a rearrangement of train schedules providing an earlier arrival time and later departure time of the Challenger trains from the Los Angeles terminal eliminated the necessity for dining cars to operate into Los Angeles, terminating this run at Las Vegas, Nevada, which arrangement necessitated the transfer of the operating home terminal of the dining car crews from Los Angeles to Omaha. This change in Challenger train operation abolished all Group B cooks' positions in Los Angeles, and an equal number of Group B cooks' position were established in the Omaha District.

The establishment by the Company of the new

train known as the "Transcon" and the extension of the dining car operation on the Los Angeles Limited through to Chicago, the dining car service of which was manned by employes of Group A of the cook's craft, permitted the employes in Group B whose positions had been abolished by discontinuance of the operation of the Challenger trains into the Los Angeles terminal to bid on the positions on the "Transcon" trains and the Los Angeles Limited, and employes holding Group B positions were assigned upon appropriate bulletin and bid to fill the Group A positions newly created, at which time such employes acquired a Group A seniority date.

(14) In May of 1947 part of the Company's Challenger trains were discontinued and in October of that year the remainder were discontinued, with the result that all positions in Group B were abolished and employes holding seniority in Group B who had not acquired a seniority date in Group A could exercise their seniority only in lower seniority groups and classes, as provided in paragraph (b) of Rule 23, Article V, Part I of the agreement, reading as follows:

"(b) An employe who is displaced must first exercise seniority in the seniority class of the seniority group in which he is working at time of displacement, and if unable to hold a position in such seniority class, may exercise seniority to displace an employe in any class and group in which he holds a seniority date, except that in districts with more than one home terminal, an employe may,

in the first instance, exercise his seniority to displace an employe in any class and group in which he holds a seniority date if necessary to enable him to continue to operate out of the same terminal."

On January 1, 1947, prior to the discontinuance of any of the Challenger trains, the following number of employes held seniority in the cook's craft in Groups A and B:

	Group A	Group B	Total
White	110	31	141
Colored	259	87	346

On January 1, 1948, subsequent to the discontinuance of all Challenger trains, the following number of employes held seniority in the cook's craft in Groups A and B:

	Group A	Group B	Total
White	97	12	109
Colored	250	49	299

As of the time the Company discontinued its Challenger trains a number of those persons listed in paragraph I of the amendment to the complaint, as well as in Appendix A attached to the original complaint filed herein, who are employed in the cook's craft did not hold seniority in a seniority group above Group B and such persons could exercise their seniority only in Group C, the lower seniority group.

(15) During all of the period since the agreement has been in effect, that is since June 1, 1942, and even prior thereto, and prior to the discontinuance by the Company of its Challenger train

service there were numerous occasions where positions were bulletined for assignment in Group A for which employees holding Group B seniority and assigned in the Challenger train service did not submit bids, although if they had many of such employees would have been assigned to Group A positions and acquired seniority in that group at that time.

It is the belief of this affiant that the reason why bids were not submitted by employees having Group B seniority in the cook's craft and holding assignment on the Challenger trains was because the requirements of the Challenger trains were less burdensome than the requirements of the service in Group A runs and the difference in the compensation between Group A runs and Group B runs was slight, not exceeding ten dollars per month and in some instances less than ten dollars per month.

As heretofore indicated, as of the time the Company discontinued its Challenger train service certain of the employees in Group B of the cook's craft were given assignments pursuant to bulletining and bidding in Group A of the cook's craft and some of them were assigned positions in Group C. However, some of them were unable to secure an assignment except certain temporary work in Group A which would not enable the establishment of seniority date in that group under the provisions of Rule 17(c) of the agreement quoted herein in item (11). Plaintiff Thomas E. Hayes is one of those persons who had not acquired Group A seniority as of the time the Challenger trains were

discontinued. He did acquire seniority in Group A on July 7, 1948.

(16) The dispute involved in the above-entitled action arises out of the fact that upon the discontinuance of the Challenger trains a number of the persons named in paragraph I of the amendment to the complaint and Exhibit A attached to the original complaint filed herein were unable to obtain an assignment under the agreement rules because of their lack of seniority in Group A. While some of the employes so affected were negroes, many of the negroes employed in the cook's craft were not so affected because of the fact they held Group A seniority at that time. The dispute involved in this action is an attempt to obtain a different seniority status contrary to that provided for under the agreement as uniformly and equally applied to all employes, both colored and white, by alleging racial discrimination which does not exist.

(17) For further information as to the application of the agreement as between white and colored employes in the cook's craft, reference is made to the affidavit of Mr. H. A. Hansen, dated August 26, 1949, filed in this action.

/s/ H. I. NORRIS.

Subscribed and sworn to before me this 10th day of September, 1949.

[Seal] /s/ [Indistinguishable],

Notary Public in and for said
County and State.

[Endorsed]: Filed September 15, 1949.

[Title of District Court and Cause.]

AFFIDAVIT OF THOMAS E. HAYES, ONE
OF PLAINTIFFS HEREIN, IN OPPOSITION
TO THE MOTIONS OF DEFENDANT
UNION PACIFIC RAILROAD AND DEFENDANT
DINING CAR EMPLOYEES'
UNION, LOCAL 372.

State of Nebraska
County of Douglas
City of Omaha—ss.

I, Thomas E. Hayes, of 2928 N. 24th Street, City of Omaha, State of Nebraska, being first duly sworn, depose and say:

I am making this affidavit for the purpose of enlarging upon an affidavit previously made by me and verified September 22, 1949, and I incorporate by reference all the allegations contained in the first two pages of that affidavit.

The grievances set forth in the original complaint herein have been the subject of written protests to both defendant railroad and defendant union ever since 1946 and during all these years defendant railroad has engaged in the practices set forth in the complaint herein and defendant union has aided and abetted defendant railroad in the course of discrimination against Negro cooks, set forth in the complaint.

Finally, it became apparent that legal action would have to be taken and accordingly a committee

was formed of which I was Chairman, for the purpose of instituting legal proceedings. As a result, all of the persons listed in the complaint and the amendment thereto as plaintiffs signed retainer agreements with Archibald Bromsen, Esq., an attorney at law, with offices at 450 Seventh Avenue, New York City, a copy of which agreement is attached to, marked Exhibit "A" and made a part of an affidavit verified by Bennie Bates on the 21st day of September, 1949, which will subsequently be filed herein.

Thereafter every person who had signed a retainer agreement with Archibald Bromsen was notified by him in writing that the San Francisco law firm of Gladstein, Andersen, Resner & Sawyer, had been employed to institute this litigation in this district and division and conduct the same, a copy of which notice is hereto attached, marked Exhibit "A" and made a part hereof. Since April 25, 1949, the date of the said notice, only one of the persons named as plaintiffs in this action has made any request to either Archibald Bromsen or any member of the said San Francisco law firm to withdraw his name as plaintiff in the litigation.

The basic discrimination complained of in the complaint herein, is that when initially hired by defendant railroad, Negro cooks are classified as Class B under Rule 19 of the Collective Bargaining Agreement between the defendants, effective June 1, 1942, whereas white cooks are from the time of hiring classified as Class A under said Rule, regardless

of any other consideration and these classifications are in no sense dependent upon fitness and ability. This is the question of fact common to all persons named as plaintiffs herein and the question of law common to all of them is whether or not discrimination of this character based solely on race, is a violation of the basic principles of the said Railway Labor Act.

Affiant has read the objections to plaintiff's interrogatories dated August 25, 1949, and particularly Objection V thereof, which alleges that the persons named therein have never at any time been employed in the Dining Car Service of defendant railroad. The persons in question are Horace Burnett, Leadis Kettor, William B. Regan, Leonard D. Rivers, John J. Shanks and Paul E. Woods. The statement made that these persons have never been employed at any time in the Dining Car Service of defendant railroad is unequivocally false with respect to each of the individuals named above. Horace Burnett, William B. Regan and John J. Shanks, were working for the Dining Car Department of defendant railroad last year. John J. Shanks worked under Chief Cook Oliver E. Odom, out of Los Angeles, California. Leadis Kettor and Paul E. Woods were working out of California in the Dining Car Department as late as March, 1949. Leonard D. Rivers is still working out of Omaha, Nebraska, as a cook in the Dining Car Department of defendant railroad.

Affiant has also read the affidavit of H. A. Hansen, verified the 26th day of August, 1949, attached to the

said Objections to Interrogatories filed on behalf of defendant railroad, as well as the affidavit of Henry J. Norris, verified the 10th day of September, 1949. In the affidavit of Hansen on the last page thereof, appears the following language:

“Certain employees in the cook’s craft whose seniority rights were first acquired in Group B, of whom the plaintiff Thomas E. Hayes is one, have made claim that the original date upon which they acquired seniority in Group B should apply also as their seniority in Group A retroactive to the date the seniority was acquired in Group B. Such action would adversely affect employees, both colored and white, holding seniority in Group A and violate said agreement effective June 1, 1942. The requested action is in effect a request for a change in the collective bargaining agreement. Affiant has been informed by the collective bargaining representative that the employees thus adversely affected are not agreeable to the requested action. Affiant further states that the controversy arising out of the aforesaid claim and disagreement between members of the cook’s craft does not arise from any discrimination as between white and colored employees in the application of seniority rights.”

The above-quoted section from the affidavit of Hansen is not true. No claim has ever been made that the seniority date acquired in Group B should apply also as a seniority date in Group A. Likewise it is not true that the claims of plaintiffs in this action do not arise from any discrimination as be-

tween white and colored employes and the application of seniority rights.

The facts are that in the Denver, Portland and Ogden districts, there have never been any Challenger or Class B runs. Yet notwithstanding this fact, every Negro cook when initially hired for service in these districts was regardless of every other consideration and simply because he was a Negro given Class B status under Rule 19 of the collective bargaining agreement between defendant railroad and union, effective June 1, 1942. Whereas, every white cook initially hired in these districts was classified as A under said Rule even though totally lacking any previous experience.

In the affidavit of H. J. Norris, verified September 10, 1949, and filed herein, on page 4 thereof, beginning with line 24, the following language appears:

“Progression from the lower seniority classification in any particular seniority group is the result of experience and training received on the job by the incumbents of the lower rated classes and the acquisition of seniority in the group.”

This statement, as far as Negro employes of the Dining Car Department of defendant railroad, is extremely misleading, if not false in its entirety. In order to demonstrate this, it will be necessary to refer to the affidavit of Stephen R. Auguston, verified August 14, 1949, and filed herein. Attached to that affidavit is a tabulation of various names, classifications of position, and Group A seniority date.

From an examination of the last column of this tabulation, the one nearest the right hand side of the page entitled Group A Seniority Date, it is impossible to determine when the seniority date was actually acquired. Take for example the case of John Bukey, the ninth name on the tabulation, classified as Chef and given a seniority date of December 29, 1919. There is nothing in the data relating to John Bukey which throws any light upon the time when this seniority date was accorded. Now as a matter of fact, the System Roster of Kitchen Employes' Seniority dated January 1, 1938, shows that John Bukey got a seniority date in Group B-1, classification Chef, on December 29, 1919. The Auguston affidavit says that John Bukey got a Group A seniority date of December 29, 1919. This is a palpable and deliberate attempt to mislead the Court, because the fact is that if John Bukey had a seniority date in Group A, he has been awarded this date recently and since 1938, because the group seniority of John Bukey on the System Seniority Roster of Kitchen Employes, dated January 1, 1938, gives him seniority in Group B and not in Group A. The Auguston affidavit would have been more informing if it had stated the precise date when John Bukey's name appeared for the first time on the Seniority Roster of defendant railroad as having a seniority date of December 29, 1919, in Group A.

According to the Auguston affidavit, John Bukey acquired his seniority date in Group A on December 29, 1919.

It is apparent that the Auguston affidavit is designed to give the impression that John Bukey, who has been in the employ of defendant railroad for approximately thirty years, has during that entire period had Group A seniority.

Furthermore, John Bukey today has only two year's Chef Cook Class A service to his record, which demonstrates the complete falsity and misleading character of the Auguston affidavit. The truth of the matter is that John Bukey never obtained a seniority date in Group A until recently and that is the reason why after thirty year's of service he can only show employment in Group A of about two year's duration.

The Auguston affidavit and the tabulation attached thereto was deliberately phrased to give the impression that the seniority dates set forth in the tabulation were actually accorded on the seniority date set forth, whereas the truth is that the seniority dates upon that tabulation were not acquired on the date shown, but very much later and as a result of the struggle which the Negro cooks employed by defendant railroad have been waging in the last four or five years.

Another name upon the tabulation attached to the Auguston affidavit is that of Edward M. Jones, who was classified as a Chef with a seniority date in Group A of August 5, 1916. This date is not the date when Group A seniority was established by him. He is shown on the System Seniority Roster of Kitchen Employes, dated January 1, 1938, as a Chef in

Group B, not Group A. Again the Auguston affidavit attempts to make it appear that his seniority date in Group A was actually accorded to him on August 5, 1916, which is not the fact. This situation is almost identical with that of John Bukey, except that Jones has three year's greater service and still can only show about two year's employment in Group A as a Chef. The fact is that the date when Jones and Bukey were actually awarded seniority date in Group A, is April 12, 1949, a fact which the Auguston affidavit deliberately and intentionally conceals.

I, myself, was not accorded a seniority date in Group A until July 7, 1948, although I was employed as a Chef Cook by defendant railroad in 1936 and 1937, and by my employment fully established my fitness and ability for the classification, yet when I was re-employed by defendant railroad on October 23, 1942, I was employed with that date as a seniority date in Group B and as Second Cook. Yet it was not until July 7, 1948, and then only as a result of struggle waged by the Negro cooks employed by defendant to enforce their seniority rights that I was accorded a seniority date in Group A.

Regardless of the seniority dates shown in the tabulation attached to the Auguston affidavit, every seniority date there shown in Group A has been acquired solely as a result of the vigorous struggle waged by the Negro cooks employed by defendant railroad to exercise their seniority rights under the agreement of 1942.

The Auguston affidavit in its entirety is composed of a tissue of deliberate falsehoods, half-truths, and misleading statements, as is shown by the following example.

On page 1, line 28, it is stated that the defendant Union Local 372 was organized on July 20, 1933, for the purpose of representing for collective bargaining purposes certain employes of Union Pacific Railroad, including kitchen employes and bar tenders on passenger trains operated by the said railroad. This is perhaps not a material misrepresentation because there is no issue here involving bar tenders, but it merely goes to show that the Auguston affidavit is not an honest or truthful statement of the facts, material or otherwise. The fact is that up to about a year ago, jurisdiction of the bar tenders was not vested in Local 372, nor was that local organized for protecting in any way the rights of the bar tenders. The bar tenders until quite recently have been subject to the jurisdiction and members of Local 465.

Again at page 2, of the same affidavit, commencing with line 26, the statement is made that the defendant union does not and has not at any time mentioned in the complaint, discriminated in any way against Negroes, but on the contrary admits Negroes to its membership upon exactly the same terms and conditions, and accords them exactly the same rights and privileges as white men without any discrimination of any kind or nature between the two.

This statement is an artful mixture of truth and

falsity designed to mislead the Court. It is true that defendant Local 372 does admit Negroes to membership and ostensibly upon the same terms and conditions as white persons, but it is not true and the maker of the affidavit knew it was not true that the Negroes have been accorded exactly the same rights and privileges as white men without any differentiation of any kind or nature between the two.

Defendant Local 372 is the collective bargaining agent of all its members and is required by law to represent all without discrimination. Yet ever since the collective bargaining agreement of 1942 was executed, the officers of defendant Local 372, notably including the affiant Stephen R. Auguston, have with full knowledge of the facts, failed to take any remedial action on behalf of the Negro members of the Local against the discriminatory practices of defendant railroad against its Negro employees in the Dining Car Department.

I have repeatedly, both verbally and in writing, brought to the attention of Auguston, the facts set forth in this affidavit and in the complaint herein, and he has completely ignored the situation and threatened to drive me off the railroad.

On page 3, line 15, of the Auguston affidavit, the following statement appears:

“Said agreement secures to Negroes exactly the same rights and privileges as white men and does not differentiate in any way between the two.”

This statement is verbally true, but it ignores the

real issue, which is discrimination against Negroes at the time they are hired by the defendant railroad. Ever since 1942, and as a matter of fact, for many years prior thereto it has been the uniform practice of defendant railroad at the time Negroes are first employed to give them seniority dates in Group B, notwithstanding the fact that by reason of fitness and capacity they were entitled to employment in higher group classifications. On the other hand, it has been the undeviating practice of defendant railroad in the case of the initial employment of white cooks, to give them seniority dates in Group A even though totally lacking in experience and capacity for the job, and this practice has been pursued with the full knowledge and approval of defendant Local 372 and with the complete support of the same Stephen R. Auguston, who says in his affidavit, page 4, lines 18 to 22, that:

“If there has been any instance in which the defendant railroad in selecting and hiring a new employe, selected and hired a white man in preference to a Negro, the defendant Union had no voice or part whatever in such selection or hiring.”

The fact is that without the support of the defendant Local 372 and of the affiant Auguston, the railroad would not have dared pursue the discriminatory policies complained of.

Again Auguston states on page 5, lines 18 to 25, the following:

“If defendant railroad at any time mentioned in the complaint, committed any act of racial discrimination in respect to any employes represented by

defendant union, defendant union was and is not aware thereof. Neither plaintiff or any other person mentioned in the complaint, called any such alleged act of discrimination to the attention of defendant union or made any request that defendant union "take action with respect thereto."

The above quotation is not a half-truth or a misleading statement. It is an absolute and unqualified falsehood and known by the affiant Auguston to be false at the time he swore to it on August 14, 1949.

I have in my possession the following correspondence between the affiant Auguston and myself, dealing with the subject of discrimination:

1. Copy of letter to Auguston, dated April 10, 1946.
2. His reply, dated May 14, 1946.
3. Copy of letter to Auguston, dated February 14, 1948.
4. Copy of letter to Auguston, dated March 31, 1948.
5. Letter from Auguston to French L. Spencer, dated April 10, 1948.
6. Letter to me from Auguston, dated April 10, 1948.

Moreover I discussed with Auguston, as long ago as May 10, 1946, the whole subject of discrimination against Negroes in the dining car service of defendant railroad and he then and there admitted to me that the discriminatory practices of which I complained were not right.

The gist of the discrimination practised by de-

fendant railroad against Negro cooks in its dining car service with the full approval, acquiescence and support of defendant Local 372, is as said above, the discrimination in initial hiring, that is the segregation of all Negro cooks at the time of original hiring in to seniority Group B and the preferential treatment accorded white cooks at the time of original hiring by classifying them in the higher seniority Group A. From this original discrimination stems all the discrimination of which complaint is made, and as a result of this discrimination it becomes practically impossible for a Negro cook, no matter how much capacity and fitness for the job he may have, to gain seniority in any group higher than that in which he is initially hired.

Under the terms of the agreement of 1942, and particularly Point I, Article IV, Rule 17 (c), it has been impossible for the Negro cooks in defendant railroad's employ to obtain a seniority date and acquire the seniority in a higher class than that to which they were assigned at the inception of their employment relations, except in accordance with the terms of said Rule 17, which provides that an employe will be accorded a seniority date in a higher group or class in which he has not previously acquired a seniority date, only upon assignment to a bulletined position or vacancy in such higher group or class, and the seniority dates so accorded will be the date of assignment and will also be accorded in all intermediate groups and classes, and an employe assigned to a position in a higher group or

class will retain the seniority held in all lower groups and classes and will continue to acquire seniority therein.

In practice Negro cooks were not permitted to bid in higher groups and classifications, or if permitted their bids were ignored and the bulletined positions were filled by defendant railroad with the full support and approval of defendant Local 372, by white employes possessing far less experience, ability, fitness and capacity, than the Negro cooks who had filed bids.

In the affidavit of H. J. Norris, consisting of fourteen pages, verified September 10, 1949, and filed herein the following language appears on page 4, lines 24 to 28:

“Progression from the lower seniority classification in any particular seniority group is the result of experience and training received on the job by the incumbents of the lower rated classes in the acquisition of seniority in the group.”

Again quoting from the same affidavit at page 5, line 23 and following:

“The Company in operating its dining car service and in filling the superior positions in its cook’s craft, has operated on the principle of promoting qualified employes to the superior positions on the basis of seniority, fitness and ability.”

These statements indicate the policy which ought to be pursued, but they have no relation whatever to the policy of discrimination that has actually been followed.

Again I quote from the same affidavit, page 6, lines 2 to 4:

“By virtue of this fact, new employes, without regard as to whether they are colored or white, are generally first employed in the inferior group and classes.”

This last statement is not true, because as I have said it has been the uniform practice of the defendant railroad to hire white employes in seniority Group A and Negro employes in seniority Group B regardless of any considerations of length of service, capacity, fitness or ability.

The vice of the entire Norris affidavit is disclosed by his Point 16, on page 13, commencing at line 32, which reads as follows:

“The dispute involved in the above-entitled action arises out of the fact that upon the discontinuance of the Challenger trains, a number of persons named in Paragraph I of the amendment to the complaint and Exhibit ‘A’ attached to the original complaint filed herein, were unable to obtain an assignment under the agreement rules because of their lack of seniority in Group A.”

That is undoubtedly the case, but all the persons listed in the complaint and the amendment thereto, are Negroes and why did they have no seniority in Group A? Because of the discriminatory practice of defendant railroad in its initial hiring when it arbitrarily accorded to all Negroes a seniority date in Group B and all whites a seniority date in Group A.

The discussion in the Norris affidavit of the Challenger runs is a false quantity because the persons named in the complaint and in the amendment thereto operated in districts where there were no Challenger runs.

The complaint is predicated upon the theory that there was this initial discrimination against Negroes at the time of original hiring and that as a result thereof, they were never able to acquire any seniority in higher groups and classes.

It now appears from the affidavit of Auguston that some of the persons have been accorded seniority dates in Group A at times not disclosed by the affidavit and solely as a result of the terrific pressures that have been generated during the last four or five years in the struggle of the Negro cooks for the right to exercise their seniority, but the discrimination still exists because John Bukey and Edward M. Jones, after thirty and thirty-three years of satisfactory service, have been able to acquire only about two years' service in seniority Group A.

The real issue in this case is the discrimination against the Negro cooks at the time they are first hired, and every evil of which they complain flows from this initial discrimination. It follows them through their entire period of employment and prevents them from building up real seniority in the seniority groups and classes higher than those to which they are arbitrarily assigned upon their first employment.

The mechanism through which the discrimination has been brought about involves the following steps:

a. The original discrimination at the time of initial hiring.

b. The refusal to accept bids by qualified Negroes for bulletined positions in higher seniority groups and classes.

c. The inability of the Negro cooks to acquire seniority even when assigned as a result of bids to employment in higher seniority groups and classes, because they have no opportunity to build up seniority in those groups and classes and are constantly required to yield their positions to white cooks with greater seniority in the groups and classes, even though the period of service in the employ of defendant railroad is far less than that of the displaced Negroes. And the reason why the Negro can not hold a bulletined position to which he has been assigned as a result of a bid, in the higher group or class, is that owing to the initial discrimination at the time of employment, he has been confined to a lower seniority group or class, whereas the white cook from the very day he was employed has had the opportunity to build up seniority in Group A, to which he was initially assigned even though totally lacking in experience.

The discrimination against the Negroes is clearly illustrated by the fact that men like John Bukey and Edward M. Jones, have served continuously in the employ of defendant railroad for thirty and

thirty-three years, respectively, and had during the entire period of time only been able to acquire about two years' seniority in Group A. Thirty and thirty-three years' employment ought to demonstrate fitness and capacity. The fact that these employes have during that period of employment, been able to achieve seniority in a higher group and class and build up two years' seniority therein out of thirty and thirty-three years, demonstrates conclusively the discrimination to which they have been subjected.

It is alleged in the complaint herein that there was discrimination at the time of initial employment and that Negroes were precluded from establishing seniority in higher groups and classes under the agreement of 1942, by defendant railroad through the medium of refusing to accept bids for bulletined positions in the higher groups and classifications, and it is further alleged that the plaintiffs were actually employed in higher groups and classifications, but without assignment, and were therefore precluded from accumulating seniority in the higher groups and classes.

In view of the fact that it now develops, especially from the Auguston affidavit, that certain of the plaintiffs, including me, have been accorded dates in seniority Group A, it becomes necessary to amend the complaint so as to show the effect of the initial discrimination at the time of hiring upon the ability of the Negro cooks to build up seniority in the higher groups and classes. In other words the complaint should be amended to show that the

discrimination which arose upon the initial hiring of the Negro cooks precluded them from achieving their rightful seniority in higher groups and classes, even when assigned as a result of bids to bulletined positions in those classes.

Discrimination can be brought about in various ways, but all of the discrimination existing in this case stems from the initial discrimination at the time of hiring. It makes no difference whether the bids of the Negro cooks to bulletined positions were accepted or rejected, the fact is that whether accepted or rejected they were never in the position to build up substantial seniority in these higher groups or classes, because they were discriminated against at the time of initial hiring.

Wherefore, affiant prays that the Court may be pleased to permit the filing of an amended complaint in accordance with a copy thereof to be first presented to the Court, and further requests that the determination of any application for leave to file an amended complaint be postponed until all pending motions and objections filed by defendants herein be disposed of.

/s/ THOMAS E. HAYES.

Subscribed to and sworn to before me this 15 day of October, 1949.

[Seal] /s/ RAY L. WILLIAMS,
Notary Public, in and for the County of Douglas,
State of Nebraska.

My commission expires on 1st day of Sept, 1950.

EXHIBIT "A"

Archibald Bromsen

Attorney at Law

450 Seventh Avenue, New York 1

April 25, 1949

Re: Discrimination Against Negro Cooks by
Union Pacific Railroad.

Dear Sir:

I want to acknowledge with thanks your retainer of this office in the matter of your above claim for damages due you resulting from violation of your job, seniority and employment rights under the U. S. Railway Labor Act. It is a privilege to represent you and your co-workers in your fight against Jim Crow and discrimination, and I will try to do everything possible to help win for you your lawful rights.

I think you will be glad to learn that in order to help bridge the many miles between us, and to accomplish the most effective handling of your claim, I have retained to work with me—(at no additional expense or obligation of any kind whatsoever to you)—the well known law firm:

Gladstein, Anderson, Resner & Sawyer, Esqs.
240 Montgomery Street
San Francisco 4, Calif.

As a result, it will be much easier and more convenient, when it becomes necessary, for you to be

interviewed personally and your case discussed with you directly.

Immediate action on your situation is planned, and your case is going to be placed into Court as quickly as possible for relief from the discrimination practiced against you.

I will continue to keep in touch with you, and, whenever necessary, you will receive communications from my San Francisco associates, Gladstein, Anderson, Resner & Sawyer, Esqs.

When you hear from either of our offices, please help by furnishing immediately whatever information or cooperation we may need, so that your case may be pressed to a successful conclusion as quickly as possible.

Very truly yours,

/s/ ARCHIBALD BROMSEN.

[Endorsed]: Filed October 19, 1949.

[Title of District Court and Cause.]

AFFIDAVIT OF H. A. HANSEN ADDRESSED
TO THE 15-PAGE AFFIDAVIT OF
THOMAS E. HAYES, VERIFIED ON OCTOBER 15, 1949.

State of Nebraska,
County of Douglas—ss.

H. A. Hansen, of Omaha, Douglas County, Nebraska, being first duly sworn, deposes and says that he is the Manager of the Dining Car and Hotel

Department, Union Pacific Railroad Company, a defendant in the above-entitled action.

Affiant states:

(1) That he has read the 15-page affidavit of Thomas E. Hayes, verified on October 15, 1949, and filed in this cause, and that the information and statements therein made are either entirely false, half-truths, or misleading and inaccurate and in recognition of the fact that it would be impossible to answer and refute in detail all of the false and misleading statements, allegations, assertions and contentions contained in the referenced affidavit, affiant makes this affidavit for the purpose of correcting some of the false, inaccurate, half-true and misleading statements contained in the said affidavit, which are pertinent and relevant to the matters now before this court as the affiant understands them.

(2) Commencing in line 28, page 2 of the referenced affidavit and continuing into line 3 on page 3, it is stated that the basic discrimination complained of is:

“That when initially hired by defendant railroad, negro cooks are classed as Class B under Rule 19 of the collective bargaining agreement * * * whereas white cooks are from the time of hiring classed as Class A under said rule, regardless of any other considerations * * * .”

The Hayes affidavit proceeds to state that:

“This is the question of fact common to all persons named as plaintiff’s herein * * * .”

Language of similar import is found in numerous places in the said affidavit. Affiant states that this statement is incorrect. The fact is that, out of 946 persons (which is the total number of persons who had or have had an employment relation with the defendant railroad company in the cook's craft during the four years preceding the filing of the complaint in the above action), 363 of said number are white persons and 583 are negroes. At the time of the first employment of the said persons, these employes were employed in the following groups and classes:

White			Negro		
Group	Class	No.	Group	Class	No.
AA	3 (Second Cooks)	2	AA	5 (Fourth Cooks)	10
AA	4 (Third Cooks)	9	A	2 (Chefs)	2
AA	5 (Fourth Cooks)	56	A	3 (Second Cooks)	13
A	2 (Chefs)	7	A	4 (Third Cooks)	39
A	3 (Second Cooks)	46	A	5 (Fourth Cooks)	254
A	4 (Third Cooks)	36	B	2 (Chefs)	4
A	5 (Fourth Cooks)	189	B	3 (Second Cooks)	27
B	4 (Third Cooks)	3	B	4 (Third Cooks)	64
B	5 (Fourth Cooks)	15	B	5 (Fourth Cooks)	165
			C	2 (Chefs)	1
		363	C	4 (Third Cooks)	4
					583

Of the 583 negroes who have had an employment relationship with the defendant railroad company during the four years preceding the filing of the complaint in this action, 86 of them are designated as plaintiffs on Exhibit A attached to the original complaint, or in the amendment to the complaint dated August 12, 1949, or in the amendment to the complaint dated September 14, 1949, and of the so-called plaintiffs their classification at

the time they were first employed is shown in the following table:

Group	Class	Number
A	2 (Chefs)	1
A	3 (Second Cooks)	2
A	4 (Third Cooks)	4
A	5 (Fourth Cooks)	6
B	2 (Chefs)	1
B	3 (Second Cooks)	10
B	4 (Third Cooks)	17
B	5 (Fourth Cooks)	45
		<hr/> 86

(3) Commencing in line 16, page 3 of the referenced affidavit, Mr. Hayes asserts that:

“Horace Burnett, William B. Regen and John J. Shanks were working for the Dining Car Department of defendant railroad last year.”

Affiant has caused a further check of the records of the defendant railroad to be made and finds no record of a Horace Burnett and William B. Regen ever having been employed by the Union Pacific Railroad Company in its Dining Car Department; that John J. Shanks was and is employed in the Dining Car Department of the defendant railroad. Mr. Hayes also stated, commencing on line 19, page 3, that:

“The Leodis Kettor and Paul E. Woods (apparently the same person referred to in the original complaint and the amended complaint as Paul E. Woods) were working out of California in the Dining Car Department as late as March, 1949.” (Parenthetical expression added.)

Affiant states that there is no record of any Leodis Kettor having worked in the Dining Car Department of defendant railroad. However, there is a

Leodis Kelton employed in the Dining Car and Hotel Department working out of Omaha Seniority District. Affiant states that he is under the impression that Mr. Hayes is not referring to Leodis Kelton, in view of the letter dated July 24, 1949, written to the affiant by Mr. Kelton. A photo-static copy of this letter is attached to this affidavit, marked Exhibit A, and hereby made a part hereof. Affiant states that he is unable to locate any record concerning Paul or Pall E. Woods. Mr. Hayes also stated, commencing on line 21, page 3, that:

“Leonard D. Rivers is still working out of Omaha, Nebraska, as a cook on the Dining Car Department of defendant railroad.”

This is the first time Leonard D. Rivers has been referred to in this action and affiant state that he is working out of Omaha, Nebraska, as a cook in the Dining Car Department, but his name is not included as a plaintiff in this action.

(4) At line 11, page 4, Mr. Hayes states that:

“No claim has ever been made that the seniority date acquired in Group B should apply also as a seniority date in Group A.”

The affiant states that he has in his possession a copy of a letter from Mr. Thomas E. Hayes dated February 14, 1948, which Mr. Hayes sent to Mr. Steven R. Auguston, General Chairman of defendant union. (This letter was furnished affiant by Mr. Hayes.) This letter is signed by Thomas E. Hayes as “Representative, Dining Car and Food Workers Union.” In this letter Mr. Hayes stated, among other things, that:

“We are demanding the following:

“(1) A complete elimination of all classes, AA, A, B and C because they have been used as a media to segregate and exploit the Colored cooks and to take from them the seniority which they have accumulated with the Union Pacific by their own labor.

“(2) That all cooks, regardless of Race, Color, Creed or National Origin, may exercise their seniority over any employee their junior on any train on the Union Pacific Railroad.”

The elimination of the various seniority classes which Mr. Hayes demanded in his letter of February 14, 1948, above quoted, is tantamount to a claim that the seniority dates acquired in Group B by the various plaintiffs in this action should also apply as seniority dates in Group A.

(5) Mr. Hayes also states in his affidavit commencing in line 16, page 4, that:

“The facts are that in the Denver, Portland and Ogden Districts there have never been any Challenger or Class B runs.”

As a matter of fact, while it is correct to state that there have never been any Challenger runs in the Denver, Portland and Ogden seniority districts, it is not a fact that there were never any Class B runs in those districts because prior to May 1, 1941, there were Class B runs in those districts which were other than Challenger runs. Such Class B runs were, on May 1, 1941, classified as Group A runs.

(6) Commencing at the top of page 5 of the

referenced affidavit, Mr. Hayes discusses the seniority status of Messrs. John Bukey and Edward M. Jones. Prior to the inauguration by the defendant railroad company of its Challenger type of train service in 1935, Messrs. John Bukey and Edward M. Jones had been employed by the Union Pacific as chefs on its train "Los Angeles Limited," as well as on other trains of comparable classification. Under the present collective bargaining agreement effective July 1, 1942, the "Los Angeles Limited" and other trains of comparable classification are classified as Group A—Standard Dining Car Runs. On August 1, 1935, the assignments held by Messrs. Bukey and Jones were classified in Group B—Other Runs.

At the time the agreement of June 1, 1942, became effective, Bukey and Jones were employed on Challenger trains (Group B classification) and all of their seniority as chefs (Class 2) was shown as being in seniority Group B. Through an inadvertent error, the prior service of these two gentlemen on trains comparable to the Group A runs under the June 1, 1942, agreement was disregarded. This mistake, if it remained uncorrected, would have resulted in these two men losing all seniority rights in their assignments as chefs on the better class of trains on which they had worked prior to 1935 when the Challenger trains were established. This error did not come to affiant's attention until the latter part of February, 1949, when second diners were removed from certain of the trains running out of the Los Angeles seniority district,

and opportunities for employment for the cooks in that district were consequently reduced. The matter was brought to affiant's attention by the Superintendent of the Dining Car and Hotel Department at Los Angeles, California, at the time. Immediately affiant entered into an agreement with General Chairman S. R. Auguston of the defendant union, dated March 14, 1949, correcting this mistake in the seniority status of Messrs. Bukey and Jones. A copy of this agreement is attached hereto marked Exhibit B and hereby made a part hereof.

Mr. Hayes attempts to make much of the fact that these two men were not accorded their proper Group A seniority dates until recently. This is of no consequence since the seniority dates accorded these gentlemen by the agreement of March 14, 1949 (Exhibit B), will be the dates governing their right to work and will be used in displacement and promotion under the agreement.

In view of the foregoing, the affiant wishes to point out that the statement at the top of page 6 to the effect that "John Bukey today has only two years' chef cook Class A service to his record" is wholly misleading since the employment opportunities afforded Mr. Bukey (as well as Mr. Jones) are the same as if he had always been listed on the seniority roster as having the seniority date accorded him under the March 14, 1949, agreement (Exhibit B).

With respect to all of the other persons listed on Exhibit A attached to Mr. Auguston's affidavit,

the seniority dates shown (except as they are corrected in this affidavit) are the dates on which the men involved actually acquired such Class A seniority.

Mr. Hayes in his referenced affidavit points out (pp. 6 and 7) that he was not accorded a seniority date in Group A until July 7, 1948, although he states that he was employed as a chef cook in 1936 and 1937. Affiant states that Mr. Hayes was discharged from the service of the defendant railroad company as a chef in 1937 because he had falsified his age in making application for his original employment and when he was rehired in 1942 he was rehired as a Group B second cook which was the only work opportunity available at the time.

(7) At line 29, page 7, Mr. Hayes states:

"The bartenders until quite recently have been subject to the jurisdiction and members of Local 465."

As a matter of fact, bartenders have never been subject to the jurisdiction of Protective Order of Dining Car Waiters, Local 465, which is composed solely of dining car waiter and lounge car attendants.

(8) In the affidavit filed by Mr. H. I. Norris, verified September 10, 1949, at line 32, page 13, he set forth the basis for the complaint in this action. In referring to this statement Mr. Hayes, at line 15, page 12, of his affidavit, states:

"That is undoubtedly the case, but all the persons listed in the complaint and the amendment thereto,

are Negroes and why did they have no seniority in Group A? Because of the discriminatory practice of defendant railroad in its initial hiring when it arbitrarily accorded to all Negroes a seniority date in Group B and all whites a seniority date in Group A."

Affiant states that the fact that many of the plaintiffs have acquired seniority in Group A is evidence itself that there has been no discrimination as between colored and white employees.

(9) Commencing at line 21, page 12, Mr. Hayes states:

"The discussion in the Norris affidavit of the Challenger runs is a false quantity because the persons named in the complaint and in the amendment thereto operated in districts where there were no Challenger runs."

Affiant state that the above quotation does not in any way reflect the true facts. All of the persons named in Exhibit A attached to the complaint, in paragraph I of the amendment to the complaint dated August 12, 1949, and in the amendment to the complaint dated September 14, 1949, operated and were employed in the districts where there were Challenger runs.

(10) Commencing in line 19, page 13, Mr. Hayes states:

"The inability of the Negro cooks to acquire seniority even when assigned as a result of bids to employment in higher seniority groups and classes,

because they have no opportunity to build up seniority in those groups and classes and are constantly required to yield their positions to white cooks with greater seniority in the groups and classes * * *."

Affiant states that presumably Mr. Hayes is referring to the fact that, through the exercise of seniority, employes are sometimes laid off as a result of force reduction. Affiant further states that an employe who is laid off continues to have an employment relation with the defendant company and continues to accumulate seniority in his appropriate class and group and the fact that he is laid off does not in any way affect his seniority status.

(11) Commencing in line 29, page 12, Mr. Hayes states:

"It now appears from the affidavit of Auguston that some of the persons have been accorded seniority dates in Group A * * *." (Emphasis supplied.)

and, commencing in line 22 on page 14, Mr. Hayes also states:

"In view of the fact it now develops, especially from the Auguston affidavit, that certain of the plaintiffs, including me, have been accorded dates in seniority Group A * * *." (Emphasis supplied.)

Affiant states that seniority in any group and class is accorded an employe under the terms of the agreement only upon his filing a bid for a bulletined position and being assigned to such position. In view of this, the fact that certain of the

plaintiffs, including Thomas E. Hayes, have seniority in Group A, should come as no surprise to Thomas E. Hayes.

(12) Affiant states that he has examined and checked the data presented in Exhibit A to Mr. Steven R. Auguston's affidavit dated September 14, 1949, and such a check has disclosed certain minor and inconsequential errors in the listing as made in that affidavit. Attached hereto as Exhibit C and made a part hereof is a statement showing corrections which should be made in the Exhibit A attached to Mr. Auguston's affidavit dated September 14, 1949. There is also attached hereto, marked Exhibit D, consisting of three pages, a revised listing of the persons named in Exhibit A attached to Mr. Auguston's affidavit dated September 14, 1949. This exhibit corrects Mr. Auguston's Exhibit A to reflect the changes which should be made as disclosed by affiant's investigation.

(13) Affiant incorporates the statements made in his affidavit of August 26, 1949, and the statements made in affidavits of Mr. H. I. Norris (Harry I. Norris), dated September 8, 1949, and September 10, 1949, filed in the above-entitled action.

/s/ H. A. HANSEN.

Subscribed and sworn to before me this 21st day of October, 1949.

[Seal] /s/ LOUIS SCHOLNICK,

Notary Public in and for said
County and State.

7/24-49

MR. H. H. HANSEN

Dear Sir

coming east this trip. MR. Red Ruble.
(edat) showed me one of those
papers of T. HAYS. With differ our
names on it an to my surprise I
in my name there also I have
not sign my name to no paper
at no other. I do not know
and have my first time
of seeing to know him I
don't know why my name
sign there. I would like to
know have you have a
other Fred's Stelton beside me
employed for that company
Nat. then then my name
in forage. because I have
and meet Hays of even
know him. I have not
sign my name to no other
of kind.

Sincerely

Fred's Stelton P.O. Box 278
MARIN CITY Calif

EXHIBIT B

(Copy)

Union Pacific Railroad Company
(Letterhead)

File 5-8-3

March 14, 1949

Mr. S. R. Auguston, General Chairman
Dining Car Employees Union, Local No. 372
3012 N. E. Weidler Street
Portland, Oregon

Dear Sir:

Referring to our conversation in Omaha last week about the serious mistake which has been made in the seniority status of John Bukey and Edward M. Jones, Los Angeles District, as disclosed by work adjustments on account of temporary changes in the number of crews assigned to Trains 1 and 2:

Prior to the inauguration of the Challenger service in 1935 both of these men had been employed as chefs on the Los Angeles Limited and other trains of comparable classification.

When the agreement dated August 1, 1935, was adopted the assignments held by Messrs. Bukey and Jones were classified in Group B, Other Runs; that is, runs other than the preferred runs which at that time included such trains as the Overland Limited and the Los Angeles Limited.

When the agreement of June 1, 1942, became effective Messrs. Bukey and Jones at that time were employed on Challenger trains in Group B and all of their seniority as chef was reported in Group B, and the prior service they had had on conven-

tional trains which are comparable to standard dining car runs, under Group A in the agreement effective June 1, 1942, was disregarded.

The effect of this was that these two men lost all seniority rights in their assignment as chef on runs on which they had worked prior to the establishment of the Challenger service in 1935; in other words, they were given a "B" date applicable to Challenger runs without any protection in the "A" classification back to 1916 and 1919, when, as a matter of fact, Challenger trains, Group B, were not operating prior to 1935.

This situation should immediately be corrected without waiting for final approval of the Los Angeles District roster dating January 1, 1949, and Edward M. Jones should be given a Group A chef's date of August 5, 1916, and John Bukey date of December 29, 1919.

In order to make this correction without further delay and penalizing work opportunity of these two old time employes will you please indicate your approval of this proper seniority adjustment in space indicated, returning one copy for my file.

Yours very truly,

Original Signed

H. A. HANSEN.

Approved:

/s/ STEVEN R. AUGUSTON,

General Chairman,

Dining Car Employees Union,

Local No. 372.

cc—Mr. J. L. Burns.

EXHIBIT C

Corrections Made in Statement of Seniority Classifications and Dates on the Group A and Group AA Seniority Rosters Attached to Steven R. Auguston's Affidavit Dated Sept. 14, 1949.

Name	Classification of Position		Group A Seniority Date	
	As Shown	Correction	As Shown	Correction
Lewis Ballard	2nd Cook	3rd Cook	9- 1-47	
Max D. Banks	2nd Cook	3rd Cook	5-23-46	
Bennie Bates	2nd Cook	3rd Cook	9- 1-47	
Henry Bradford	3rd Cook		5- 9-45	No "A" Date
Henry Barnett	-----	Chef	No "A" Date	6- 2-46
Willie R. Burton	3rd Cook	3rd Cook A	8-24-46	
	-----	4th Cook AA	-----	1-10-48 AA
Tom D. Clerkley	4th Cook	2nd Cook	6-16-48	6- 2-46
Leroy Fisher	3rd Cook	4th Cook	7- 1-47	
Edward W. Hamilton	3rd Cook	Chef	A 6- 2-46	
	3rd Cook	2nd Cook	AA 6-12-47	
Robert J. Ivory	4th Cook		5- 1-48	5-21-48
Luther W. Jackson	2nd Cook	Chef	1- 3-45	3-27-45
Marion J. Johns	3rd Cook	2nd Cook	9- 1-47	

Name	Classification of Position		Group A Seniority Date	
	As Shown	Correction	As Shown	Correction
Henry O. Jurey	2nd Cook	Chef	6- 2-46	
Edmond King, Jr.	3rd Cook		5- 3-46	5-23-46
Hayward Maynor	3rd Cook	2nd Cook	6- 2-46	
Eugene McCarthy	3rd Cook	4th Cook	No "A" Date	12- 9-47
John L. Miller	-----	4th Cook	No "A" Date	9- 1-47
Walter M. Moore	3rd Cook	2nd Cook	6- 2-46	4-20-45
Richard O. Morrison	4th Cook	3rd Cook	9- 1-47	
Belford N. Moses	2nd Cook	Chef	6- 2-46	
Edgar Nelson	4th Cook	3rd Cook	10- 8-47	12-18-45
Charles N. Pankey	B.C. Chef	Chef	No "A" Date	9- 1-47
Isiah Rivers	-----	4th Cook	No "A" Date	6-26-48
John J. Shanks			Not Identified	No Longer Employed
Albert E. Simpson	4th Cook		AA 5-19-47	
	4th Cook	3rd Cook	A 5-20-46	A 7- 9-46
Charles A. Smith	4th Cook	Chef	6- 2-46	9-12-46
Konwood Thomas	4th Cook	3rd Cook	12- 9-47	
Vernell Thompson	4th Cook	2nd Cook	3-19-46	8- 1-46
Harvey H. Trammell	4th Cook	3rd Cook	6- 2-46	
Jerome O. Watson	4th Cook	3rd Cook	7- 7-48	

EXHIBIT D

Name	Classification of Position	Group A Seniority Date
Thomas E. Hayes	2nd Cook	7- 7-48
Alfred Allen	2nd Cook	8- 5-47
Lewis Ballard	3rd Cook	9- 1-47
Max D. Banks	3rd Cook	5-23-46
Bennie Bates	3rd Cook	9- 1-47
Dewey Berry	4th Cook	11-25-44
Henry Bradford		(No "A" Date)
Clarence O. Buckner	4th Cook	6-16-48
John Bukey	Chef	12-29-19
Richard Buntin	2nd Cook	6- 2-46
Henry Burnett	Chef	6- 2-46
Horace Burnett		(Not Identified)
Willie R. Burton	3rd Cook	"A" 8-24-46
	4th Cook	"AA" 1-10-48
M. J. Clayton	Chef	6- 2-46
Tom D. Clerkley	2nd Cook	6- 2-46
Raymond Corbin	3rd Cook	9- 1-47
Flenoid Cunningham	Waiter	
Ted Eaton	Waiter	
Albert L. Ellington	4th Cook	(No Date)*
Robert M. Ewing	Chef	9- 1-47
Leroy Fisher	4th Cook	7- 1-47
Waymon Fleming	4th Cook	7- 4-48
Freddie Franks	4th Cook	7- 4-48
Langston Gardner	2nd Cook	6- 2-46
Junior L. Gilreath	3rd Cook	9- 1-47
Dennis Hall	Chef	9- 1-47
Edward W. Hamilton	Chef	"A" 6- 2-46
	2nd Cook	"AA" 6-12-47
Elbert L. Holliday	Waiter	
Robert J. Ivory	4th Cook	5-21-48
Luther W. Jackson	Chef	3-27-45
Marion J. Johns	2nd Cook	9- 1-47
Charles Johnson		(No "A" Date)

* First entered service June 1, 1949, and will not acquire seniority date until he has had ninety days' service.

Name	Classification of Position	Group A Seniority Date
Donald W. Johnson	4th Cook	7-22-47
Edward M. Jones	Chef	8- 5-16
Theodore R. Jones	Chef	6- 2-46
Henry O. Jury	Chef	6- 2-46
Leadis Kettor		(Not Identified)
Edmond King, Jr.	3rd Cook	5-23-46
L. A. King	2nd Cook	6-13-46
Robert Lillard		(No Longer Employed)
John H. Lofton		(No Longer Employed)
Joel Manning	4th Cook	6- 2-46
Osceala Manning	4th Cook	6- 2-46
Frederick J. May	Waiter	
Hayward Maynor	2nd Cook	6- 2-46
Eugene McCarthy	4th Cook	12- 9-47
John L. Miller	4th Cook	9- 1-47
Walter M. Moore	2nd Cook	4-20-45
John W. Morgan	4th Cook	5-23-46
Richard O. Morrison	3rd Cook	9- 1-47
Belford N. Moses	Chef	6- 2-46
Edgar Nelson	3rd Cook	12-18-45
Leonard A. Nelson		(No Longer Employed)
Lawrence Nolbert	Waiter	
Oliver E. Odom	Chef	6- 2-46
Charles N. Pankey	Chef	9- 1-47
William B. Regen		(Not Identified)
Charles M. Renfro	2nd Cook	6- 2-46
Leonard D. Riuers		(Not Identified)
Isiaiah Rivers	4th Cook	6-26-48
Benjamin Robinson	Chef	6- 2-46
Harvey H. Robinson	Chef	6- 2-46
Frank Sanders, Jr.	4th Cook	7- 4-48
Thomas Savage	2nd Cook	9-23-44
John J. Shanks		(No Longer Employed)
John A. Shaw	4th Cook	6-15-48
French L. Spencer	Business Car Chef	(No "A" Date)
Albert E. Simpson	3rd Cook	"A" 7- 9-46
	4th Cook	"AA" 5-19-47
Albert Smith	Waiter	

Name	Classification of Position	Group A Seniority Date
Charles A. Smith	Chef	9-12-46
Thomas R. Spikes	Chef	6- 2-46
Vernon Stamps	2nd Cook	10-10-45
Amos Stoner	(No Longer Employed)	
Willie M. Swanson	4th Cook	6- 2-46
Kenwood Thomas	3rd Cook	12- 9-47
Vernell Thompson	2nd Cook	8- 1-46
Harvy H. Trammell	3rd Cook	6- 2-46
Robert C. Turner	3rd Cook	7-19-48
Livinston S. Vaughn	(No "A" Date)	
Roscoe J. Vaughn, Jr.	4th Cook	9- 1-47
Jarome O. Watson	3rd Cook	7- 7-48
Henry D. Wiley	(No Longer Employed)	
J. M. Williams	3rd Cook	6- 2-46
Henry L. Williamson	Chef	6- 2-46
Chas. P. Westbrooke	Chef	6- 2-46
Charles Winston	Chef	6- 2-46
Elie Woods, Jr.	3rd Cook	9- 1-47
Pall E. Woods	(Not Identified)	

Copy received.

[Endorsed]: Filed October 24, 1949.

[Title of District Court and Cause.]

AFFIDAVIT OF H. A. HANSEN

State of Nebraska,
County of Douglas—ss.

H. A. Hansen, of Omaha, Douglas County, Nebraska, being first duly sworn, deposes and says that he is the Manager of the Dining Car and Hotel Department of the Union Pacific Railroad Company, and that he makes this affidavit concerning

certain statements contained in the 5-page affidavit of Thomas E. Hayes, verified September 22, 1949, and filed in the above-entitled action.

Affiant states:

(1) That all officers and employes of the Dining Car and Hotel Department of the defendant railroad company are under affiant's jurisdiction and that if any such action of the nature set forth in the said affidavit of Thomas E. Hayes had taken place as alleged that such action would have been reported to him or come to his attention or knowledge in some manner.

(2) That the statement in the above-named affidavit filed by Mr. Thomas E. Hayes, commencing on line 2, page 3, and continuing through line 19 of that page, to the effect that railroad officials threatened the signers of any retainer agreements with being fired from their jobs "after September 1"; that refusal to so sign would place their jobs in jeopardy, and that bodily harm would result if they did not withdraw from the above-named suit, are likewise entirely false and without any basis or foundation whatsoever.

(3) That this affiant has not discussed the above-entitled action with any of those persons listed on Exhibit A attached to the complaint, or in paragraph I of the amendment to the complaint dated August 12, 1949, or in the amendment to the complaint dated September 14, 1949, and that he has

not, directly or indirectly, at any time, threatened, intimidated or made any statements whatsoever to any of the said persons to the effect that, unless they signed an affidavit withdrawing themselves from the above-entitled lawsuit, they would lose their job, be run off the railroad, or suffer physical injury; nor has affiant made any promises of reward of any kind to any of said persons in an effort to induce any of them to sign said affidavit.

(4) That, to the best of this affiant's knowledge, no official of the Union Pacific Railroad Company has at any time, either directly or indirectly, threatened, intimidated or made any statements whatsoever to any of the said persons to the effect that, unless they signed an affidavit withdrawing from the above-entitled action, they would lose their job, be run off the railroad or suffer physical injury, or made any promise of reward of any kind to any of the said persons in an effort to induce any of them to withdraw from the above lawsuit.

/s/ H. A. HANSEN.

Subscribed and sworn to before me this 21st day of October, 1949.

[Seal] /s/ LOUIS SCHOLNICK,

Notary Public in and for Said
County and State.

Receipt of copy acknowledged.

[Endorsed]: Filed Oct. 24, 1949.

[Title of District Court and Cause.]

AFFIDAVIT OF THOMAS E. HAYES ADDRESSED TO THE NINE-PAGE AFFIDAVIT OF H. A. HANSEN, VERIFIED OCTOBER 21, 1949.

State of Nebraska,
County of Douglas,
City of Omaha—ss.

I, Thomas E. Hayes, of 2928 N. 24th Street, City of Omaha, State of Nebraska, being first duly sworn, depose and say:

That I am one of the plaintiffs in the above-entitled action. Further I state:

(1)) That I have read the nine-page affidavit of H. A. Hansen, verified October 21, 1949, and filed in this cause. And that the said affidavit contains many misstatements of fact which are hereinafter discussed.

(2) In my affidavit verified October 15, 1949, I made a statement that when initially hired by defendant railroad, Negro cooks are given seniority dates in Group B, whereas white cooks are from the time of hiring given seniority dates in Group A regardless of any other considerations. Mr. Hansen challenges this statement and sets up a tabulation on page 2 and 3 of his affidavit setting forth various categories of Negro cooks including Chefs and alleges that in each of these categories Negro cooks were initially hired and given an initial sen-

iority date in the various groups and classifications as set forth in the tabulation. For example, the affidavit states that ten Negroes were initially hired in Group AA, Class 5; two Negroes in Group A, Class 2; thirteen Negroes in Group A, Class 3; thirty-nine Negroes in Group A, Class 4; and 254 Negroes in Group A, Class 5. The affidavit deals with initial hirings of Negroes within the four-year period next preceding the filing of the complaint herein.

The fact is that with respect to the ten Negroes alleged to have been hired in Group AA, Class 5, not one Negro had been hired in Group AA in the said four-year period. In this connection, I wish to observe that the City of St. Louis started in regular service last spring and that the dining car service on said train is manned entirely by all Negro cooks not one of whom was hired with initial seniority in Group A, but only in Group B, notwithstanding the fact that the City of St. Louis is a Group A train.

With respect to the two Negroes hired in Group A, Class 2 Chefs, no Negro within the said period of four years has been initially hired as a Chef, but on the contrary Chefs have been taken from Class 2 (Second Cooks) and promoted by bid, if promoted at all.

With respect to the thirteen Negroes alleged to have been hired initially in Group A, Class 3 (Second Cooks, only one has been so hired within the said four-year period. This one is Tom Savage who was hired in 1944.

With respect to the thirty-nine Negroes alleged to have been initially hired in Group A, Class 4, none whatever were hired in Group A during the said four-year period.

With respect to the 254 Negroes alleged to have been initially hired in Group A, Class 5, none were so hired during the said four-year period. In this Group Robert C. Turner, one of the plaintiffs herein, worked several years on Class A trains, during all of which period he obtained no seniority date in Class A, but on the contrary got his seniority date September 19, 1948, which is a demonstration that he was not hired initially with seniority date in Group A. Another plaintiff herein, Konwood Thomas, although having worked for a period of years prior to December 9, 1947, did not get his seniority date in Group A until December 9, 1947, thus establishing conclusively that he was not hired with a seniority date in Group A. In this Group, Eugene McCarthy, although employed several years, has not yet achieved a seniority date in Group A, thus again establishing conclusively that he was not initially hired with a seniority date in Group A.

On page 3 of Mr. Hansen's affidavit there is a classification of eighty-six of those who are designated as plaintiffs in this action, showing several of them originally hired in Group A and in various Classes in that Group. This is an absolutely false statement as there is no person named as plaintiff in these proceedings who attained a seniority date

in Group A upon initial hiring, but on the contrary every one of them were first hired and given seniority dates in Group B.

In the exhibits attached to the affidavit of Auguston, verified August 14, 1949, and subsequently corrected in so-called minor details, there is not one individual who was at the time of initial hiring given a seniority date in Group A, but on the contrary every one of them were initially hired with seniority dates in Group B and the fact that it was not until years afterwards that they were first accorded seniority dates in Group A demonstrates conclusively that they were not originally hired in that Group, but only in Group B.

With regard to the person referred to on page 4 of Mr. Hansen's affidavit, as Leodis Kelton, Mr. Hansen states that I am not referring to Leodis Kelton in view of a letter written by Kelton under date of July 24, 1949, a copy of which is attached to the Hansen affidavit. In this connection I wish to say that the statements contained in the said copy are as follows:

"I have not signed my name to no paper that or no other. I do not know Mr. Hayes. I don't know why my name is signed there. I have never met Mr. Hayes or even seen him. I have not signed my name to nothing of that kind."

The fact is that notwithstanding Mr. Hansen's impression to the contrary, I was referring to Leodis Kelton whom I know well. His letter however is an illustration of the lengths to which a

terrorized man will go when sufficiently intimidated by his employer. The reason why his name appears in the suit, is because Mr. Robert M. Ewing personally asked him to sign a retainer directed to Archibald Bromsen. Last night while talking with Mr. Sawyer and Mr. Ewing at Mr. Sawyer's home in San Francisco, I was shown the original retainer signed by Leodis Kelton. On the line above "Signature" on the form, he wrote Leadis Kelton; on the line above "Name—Printed," he wrote Leadis Kettor, and because he signed this retainer is the reason why his name appears in the suit.

On page 4 of Mr. Hansen's affidavit, referring to Leonard D. Rivers, he says this is the first time he has been referred to in this action. Leonard D. Rivers' name appears in Exhibit A, attached to the original complaint, only his last name is spelled Riuers, because his signature shows a printed "v" in the word Rivers, which was misinterpreted by a stenographer as a "u," which is the reason Rivers' name appears as Riuers in the said Exhibit "A,"

On page 7 of Mr. Hansen's affidavit it is stated that I was discharged because I falsified my age in making application for original employment. This is false and the facts are as follows. When I was employed by defendant Union Pacific Railroad in 1936 I had previously been in the employ of the Dining Car Department of the Pennsylvania Railroad and for years had served as second cook on the diners attached to the most luxurious excess

fare trains in the United States at that time, namely, the Broadway Limited and the Congressional Limited and other excess fare trains of similar type operated by the Pennsylvania Railroad. All the personnel information which defendant Union Pacific had at the time I was employed in 1936 was obtained from my personnel records which the Union Pacific secured from the Pennsylvania Railroad and I made no representation as to my age. The real reason I was discharged was because a Mr. N. M. Leshner, then and now an official of defendant Union Pacific Railroad, was unable despite his best efforts to collect \$35.00 from me for the benefit of Day Employment Agency of Chicago, which the employment agency claimed I owed them. The circumstances were that the employment agency agreed to get me a hotel job and not a railroad job which I could have gotten myself at any time. They failed to get me a hotel job and had nothing to do with my employment by defendant Union Pacific Railroad in 1936. Nevertheless, the Day Employment Agency besought the aid of the said Leshner to force me to pay \$35.00 to the said Day Employment Agency and as a result of my refusal was discharged by Leshner.

It is not true that when I was rehired in 1942 by Defendant Union Pacific Railroad I was given a seniority date in Group B, Second Cook, because that was the only work opportunity available at the time. On the contrary I was put into Group B, because I was a Negro and at, or about, the same

time I was hired, other white men with little or no experience or qualifications were at the time of initial hiring automatically given a seniority date in Group A.

In short, notwithstanding the misleading if not consciously false statements contained in Mr. Hansen's affidavit, the fact is that during the four-year period prior to the filing of the complaint herein, discrimination against Negroes was rife in the Dining Car Department of defendant Union Pacific Railroad and the only amelioration in this discrimination was belatedly obtained through pressures brought to bear by me and a host of other Negroes associated with me, all of whom are parties to the present litigation.

As an illustration of this discrimination, take the case of my own bid for a position on the Overland, a Group A train, in 1946. I bid for the job under the provisions of the Collective Bargaining Agreement of June 1, 1942. I had had years of experience in the best dining car services operated by the best railroads in the United States, notably by those of the Pennsylvania Railroad. I therefore had capacity and fitness. Prior to the time I made my bid, Auguston assured me that not only would I get the bid and be assigned to the position, but also if my bid was accepted I would have to accept the position. After the time for bidding expired, a notice was published on the bulletin board that no qualified bidder had appeared. This was false because I appeared, submitted a bid and was quali-

fied. I asked Mr. Hansinck, an official of the Dining Car Department of defendant railroad to give me a letter telling me why I was not qualified, why my bid was not accepted and why I was not assigned to the position and he refused to give me any such letter. My case is only typical of the experience of many, if not all, of the Negro cooks involved in this litigation.

And so I repeat that the source of all Negro discrimination is that Negroes when initially hired and no matter how well qualified, are automatically and by reason of their race only, given seniority dates in Group B. Whereas whites when initially hired and notwithstanding complete lack of qualification, are automatically and because they are white, given seniority dates in Group A. From this initial discrimination spring all the abuses to which the Negro cooks in the employment of the defendant railroad have been subjected during not only the four years prior to the filing of the complaint herein, but for the last forty years.

/s/ THOMAS E. HAYES.

Subscribed to and sworn to before me this 31st day of October, 1949.

[Seal] /s/ RUTH M. DOSS,
Notary Public in and for the County of Douglas,
State of Nebraska.

My Commission Expires on the 27th day of November, 1954.

[Endorsed]: Filed November 7, 1949.

[Title of District Court and Cause.]

AFFIDAVIT OF J. HANSINK

State of Nebraska,
County of Douglas—ss.

J. Hansink, of Omaha, Douglas County, Nebraska, being first duly sworn, deposes and says that he is the Superintendent (Eastern District) of the Dining Car and Hotel Department of the Union Pacific Railroad Company, one of the defendants in the above-entitled action, and that he has read the 7-page affidavit of Thomas E. Hayes, verified on October 31, 1949, filed in the above-entitled action, and makes this affidavit in regard to the statements made by Mr. Hayes commencing at page 6, line 16, through line 2 on page 7.

Affiant states:

Mr. Hayes asserts that at some time in 1946 he filed a bid for a bulletined position on the "Overland," a Group A train, and that, after the time for bidding had expired, a notice was published on the bulletin board stating that no qualified bidder had made application under this bid. I have examined the records covering each of those bids which Mr. Hayes submitted under the various bulletins in which Mr. Hayes was not the successful applicant. In not one of those instances was any bulletin published showing that no qualified bidder had made application. I do not recall having had any conversation with Mr. Hayes of the nature described in

his affidavit (page 6, line 20) and I do not believe there is any factual foundation for Mr. Hayes' assertions.

In every instance in which Mr. Hayes was an unsuccessful bidder for a bulletined position, the position was assigned to an employe who had made appropriate applicaiton therefor and was entitled to the position sought in preference to Mr. Hayes under the provisions of the collective bargaining agreement effective June 1, 1942, as uniformly applied to both colored and white employes.

/s/ J. HANSINK.

Subscribed and sworn to before me this 11th day of November, 1949.

[Seal]: /s/ LOUIS SCHOLNICK,
Notary Public in and for
said County and State.

[Endorsed] Filed November 15, 1949.

[Title of District Court and Cause.]

AFFIDAVIT OF H. A. HANSEN ADDRESSED
TO THE 7-PAGE AFFIDAVIT OF
THOMAS E. HAYES, VERIFIED ON
OCTOBER 31, 1949.

State of Nebraska,
County of Douglas—ss.

H. A. Hansen, of Omaha, Douglas County, Nebraska, being first duly sworn, deposes and says that

he is the Manager of the Dining Car and Hotel Department of the Union Pacific Railroad Company, one of the defendants in the above-entitled action, and that he has read the 7-page affidavit of Thomas E. Hayes (hereinafter referred to as the "Hayes affidavit"), which was verified on October 31, 1949, filed in the above-entitled action, and makes this affidavit in regard to some of the false and misleading statements, allegations and assertions contained in the Hayes affidavit.

Affiant states:

(1) On page 2, commencing in line 16, of the Hayes affidavit, reference is made to my affidavit of October 15, 1949 (hereinafter referred to as "my affidavit"). Mr. Hayes asserts that my affidavit "deals with the initial hiring of Negroes within the four-year period next preceding the filing of the complaint herein." (Emphasis supplied.)

Mr. Hayes is completely mistaken. My affidavit did not deal with the initial hirings which occurred only within the said four-year period. The data presented at pages 2 and 3 of my affidavit dealt with the initial hirings whenever the same may have occurred and was not limited to those hirings which occurred only within the four-year period next preceding the filing of the complaint herein, nor was there anything in my affidavit so stating.

Specifically, I stated (commencing at line 18, page 2), that, during the said four-year period, there were 946 persons (363 of whom were white and 583

of whom were Negroes) who had or have had an employment relation with the defendant Union Pacific Railroad Company in the cook's craft. The data at pages 2 and 3 of my affidavit concerned the initial hirings of these 946 persons without regard to when they were hired. I did not refer only to those who were hired within the four-year period preceding the filing of the complaint. Many of the 946 persons who had such an employment relation with the defendant railroad during the said four-year period were in fact hired in years previous thereto.

Mr. Hayes made statements in his 15-page affidavit, verified on October 15, 1949, as to the alleged discriminatory hiring practices of the defendant Union Pacific Railroad Company and he asserted that "all Negro cooks at the time of original hiring" were discriminatorily segregated and assigned to Group B. (See page 10, line 17, 18 and 19, of Mr. Hayes' 15-page affidavit, verified October 15, 1949.) Since Mr. Hayes asserted that the defendant Union Pacific Railroad Company had always discriminated against all Negroes in their initial hiring, I did not limit my statement to hirings occurring only within the said four-year period and there was no indication in my affidavit to that effect.

(2) In the tabulation at the bottom of page 2 of my affidavit, I pointed out that ten of the Negroes who held an employment relation with the defendant Union Pacific Railroad Company during the said four-year period had been originally hired in Group AA and Class 5 (fourth cook). That statement is

correct. Mr. Hayes does not deny that this correctly reflected the fact but in his affidavit (page 2, lines 20 and 21) makes the misleading and false assertion that "not one Negro had been hired in Group AA in the said four-year period." I made no statements whatsoever in my affidavit concerning the number of Negroes who have been initially employed in Group AA during the said four-year period. However, the fact is that each one of these 10 Negroes was hired originally in Group AA and each one was hired during the four-year period preceding the filing of the complaint. The names and dates of initial hiring in Group AA of these ten persons are as follows:

Name	Date of Initial Hiring in Group AA
Otis Baston	9-17-47
Willie Earl	9-17-46
Thos. P. Kuykendall	6-19-48
Leon Mayfield	7- 4-46
W. A. Moland	10-30-47
Vernon J. Rose	7-25-47
Albert Savage	7-14-47
Sylvester Teague, Jr.	12- 2-47
Jimmie L. Vaughn	7- 1-48
George L. Wesley	7-21-47

(3) Mr. Hayes, at page 2, lines 21 through 26, "observes" and alleges that dining car service on the defendant's train the "City of St. Louis" is manned entirely by Negro cooks. This statement is correct. Mr. Hayes' statement on the same page (line 26) that the train "City of St. Louis" is a Group A train is not correct. The "City of St. Louis" is a Group AA train and consequently all cooks regularly assigned to this run have Group AA

seniority. Mr. Hayes' statement to the effect that not one of those Negro cooks employed on the "City of St. Louis" was hired with initial seniority in Group A is not correct. The fact is that of the cooks assigned to the "City of St. Louis" there are 28 Negroes who were hired initially in Group A. The names and dates of initial employment are as follows:

Name	Date of Initial Employment in Group A
George M. Gillespie	10- 9-42
Dewey Berry	11-25-44
Eddie Luke	9-27-45
Larnie C. Allen	10-31-45
Willie B. Daniels	1-15-46
Arthur C. Lawrence	4-15-46
Floyd Mayfield	8-18-42
Nathan Owens	10-18-42
Leonard D. C. Harrison	8-13-42
Alfred McCowan	3- 5-43
Herman Jones	1- 3-43
Waddell M. Harper	5- 1-43
Reeves J. Smith	6-12-44
James N. Thomas	10- 5-45
Cartrol Logan	8-26-45
DeWitt Robinson	2- 5-46
George Harris	7-17-46
Archie D. Parker	5-14-47
Frank Watkins	7-21-47
Halsie B. Owens	7-21-47
L. D. Cooper	12-21-47
George Walker	7- 1-48
Ulysses G. Garrison	7- 5-48
Eugene M. Roberts	7-10-48
Elisha J. Lewis	7-23-48
Halsie M. Owens	1- 5-49
Monroe Malone	1-10-49
Frank A. Burgess	2- 4-49

(4) In the tabulation at the bottom of page 2 of my affidavit I stated that of all those persons who had an employment relation with the defendant Union Pacific Railroad Company during the said four-year period there were two Negro cooks who were initially hired in Group A, Class 2 (chefs). Mr. Hayes, at page 2, in lines 27-30, refers to this item. The statement in my affidavit correctly reflected the facts. Mr. Hayes does not deny this, but makes the misleading and false assertion (lines 28-29) that:

“No Negro within the said period of four years has been initially hired as a chef but on the contrary, chefs have been taken from class 3 (second cooks) and promoted by bid, if promoted at all.”

I made no statements whatsoever in my affidavit concerning the number of Negroes who have been initially hired as chefs (class 2) during the four-year period preceding the filing of the complaint herein. The fact is there have been no persons, either colored or white, who have been initially hired in the past four years as chefs (Class 2) in any seniority group.

(5) In the tabulation at the bottom of page 2 of my affidavit I showed that 13 of the Negroes who held an employment relation with the defendant Union Pacific Railroad Company during the said four-year period had been hired initially in Group A, Class 3 (second cooks). Mr. Hayes does not deny that this statement correctly reflected the facts, but in his affidavit (page 2, line 32, and continuing

through line 2, page 3) makes the misleading and false assertion that only one Negro "has been so hired within the said four-year period." I did not make any statements in my affidavit concerning the number of Negroes who have been initially employed in Group A, Class 3 (second cooks) during the four-year period preceding the filing of the complaint herein. Again, I wish to point out that the figures which I listed in my affidavit did not state that all of the Negro employes referred to had been hired initially within the four-year period. Many of them were hired before the said four-year period. I merely pointed out that of the number who had an employment relation during the four years preceding the filing of the complaint, 13 had been initially hired in Group A, Class 3. However, the fact is that eight of these 13 Negroes I referred to were hired initially in Group A, Class 3 (second cooks) during the four-year period preceding the filing of the complaint. The names and dates of initial employment in Group A, Class 3, of the eight Negroes referred to are as follows:

Name	Date of Initial Employment in Group A, Class 3
George R. Adams	7- 6-45
Ira L. Gallaway	9-22-45
Thomas Jackson	11-14-45
Isreal Jones	9-27-45
Willie L. Jones	10-28-45
John H. McElwee	8-28-45
James Roberts	1- 7-46
Steve Stevenson	1- 6-46

(6) In the tabulation at the bottom of page 2 of my affidavit, I stated that 39 of the Negroes who had an employment relation with the defendant Union Pacific Railroad Company during the said four-year period were hired initially in Group A, Class 4 (third cooks). That statement was correct. Mr. Hayes does not deny this; however, in his affidavit (page 3, lines 3-5), he makes the misleading and false assertion that:

“None whatever were hired in Group A during the said four-year period.”

I made no statements in my affidavit concerning the number of Negroes who have been initially employed in Group A, Class 4, during the said four-year period. However, the fact is that, out of the 39 Negroes referred to, there were 30 Negroes who were hired initially in Group A, Class 4, during the said four-year period. The names and dates of initial employment are as follows:

Name	Date of Initial Employment in Group A, Class 4 (third cooks)
Larnie C. Allen	10-31-45
Clarence L. Benton	10- 2-45
Vincent O. Carter	5-22-46
James R. Crawford	5-10-46
Willie B. Daniels	1-15-46
William Edmond, Jr.	11-10-45
Albert Ellington	9-17-45
Hilliard W. Goldsmith	11- 1-45
Willie Henry	3- 7-46
Theodore S. Jordan	8-29-45
Leodis Kelton	4-18-46
Samuel H. King	10- 5-45
Arthur C. Lawrence	4-15-46

Name	Date of Initial Employment in Group A, Class 4 (third cooks)
Eddie Luke	9-27-45
Nolden Mason	8-28-45
Joseph S. Maxwell	8- 3-45
Coral J. Morris	6- 9-48
Eddie Morris	4-10-46
Edgar Nelson	12-18-45
Selman E. Nichols	12-11-45
Robert Nolen, Jr.	8-20-45
Eugene Patt	8- 1-45
Nick Patton	7-27-45
Henry C. Record, Jr.	8- 1-45
Freddie L. Reed	4-28-46
Clarence L. Springer	10-30-45
Willie Steward	11-21-45
Sam S. Sutera	4- 9-46
L. B. Williams	9- 1-45
Ossie L. Young	7-27-46

(7) In the tabulation at the top of page 3 of my affidavit, I stated that 254 of the Negroes who held an employment relation with the defendant Union Pacific Railroad Company during the said four-year period had been initially hired in Group A, Class 5. I have rechecked the personnel records and the applicable seniority rosters and the figure should be 251 instead of 254. Again, Mr. Hayes in his affidavit (page 3, lines 6-8) makes the misleading and false assertion that "none were so hired during the said four-year period."

I did not make any statements in my affidavit concerning the number of Negroes who have been initially hired or employed in Group A, Class 5, during the four-year period preceding the filing of the complaint herein. However, the fact is that, dur-

ing the said four-year period, 199 Negroes were originally hired or employed in Group A, Class 5. The names and date of initial employment in Group A, Class 5, for each of these 199 colored persons is shown on Exhibit B, attached hereto and made a part hereof.

Continuing, Mr. Hayes asserts (page 3, lines 8-13) that Mr. Robert C. Turner is "in this group" and that Turner acquired a seniority date (Group A) on September 19, 1948, but, Hayes states, this was not Turner's initial hiring. Nowhere in my affidavit did I state that Mr. Turner was one of those Negroes who had been initially hired in Group A. Mr. Turner's name is shown on Exhibit D, which was attached to my affidavit, as having Class A seniority with a seniority date of September 19, 1948, but I did not state that that was the initial date of his hiring, nor did I state that he was one of the 254 Negroes who were initially hired in Group A, Class 5.

Similarly, Mr. Hayes asserts (page 3, lines 13-17) that Mr. Kenwood Thomas "worked for a period of years prior to December 9, 1947, did not get his seniority date in Group A until December 9, 1947, thus establishing conclusively that he was not hired with a seniority date in Group A." Nowhere in my affidavit did I state that Mr. Thomas was one of those Negroes who had been initially hired in Group A. Mr. Thomas' name is shown on Exhibit D attached to my affidavit as having Group A seniority date of December 9, 1947, but I did not state he was initially hired in that seniority group.

In both of the above instances, Mr. Hayes is confusing and misconstruing Exhibit D attached to my affidavit, which did not relate in any way to the initial hiring of the employees there listed, with the figures presented at pages 2 and 3 of my affidavit, which detailed the facts concerning the initial hiring of all those cooks in the Dining Car Department who had an employment relation during the four years next preceding the filing of the complaint herein.

The data presented in Exhibit D, attached to my affidavit, listed those so-called plaintiffs in this action who hold seniority in Group AA and A and was directed to the allegations made by Mr. Hayes that the defendant Union Pacific Railroad Company had denied plaintiffs seniority in the "higher classes and groups" as alleged in paragraph XII of the complaint filed herein. The data shown in Exhibit D demonstrated the falsity of such allegation.

(8) Mr. Hayes, on page 3, lines 17-20, of his affidavit, refers to Mr. Eugene McCarthy and states that:

"* * * although employed several years (Mr. McCarthy) has not yet achieved a seniority date in Group A, thus again establishing conclusively that he was not initially hired with a seniority date in Group A." (Parenthetical expression added by affiant.)

I wish to state that nowhere in my affidavit did I state that Mr. Eugene McCarthy was originally

hired in Group A. Mr. McCarthy is shown on Exhibit D attached to my affidavit as having fourth cook seniority in Group A, with a seniority date of December 9, 1947. This is a fact and Mr. McCarthy is shown on the official seniority roster for Seniority District 1 (Omaha District) as having acquired seniority in Group A as a fourth cook (Class 3) on December 9, 1947. There is attached hereto and made a part hereof a photostatic copy of sheet number 9 of the seniority roster for the Omaha district dated January 1, 1948, which shows Mr. McCarthy as having the Group A date above indicated. (I have underlined Mr. McCarthy's name on Exhibit A.)

(9) At page 3, lines 21-28, of Mr. Hayes' affidavit the following statement is made:

"On page 3 of Mr. Hansen's affidavit there is a classification of 86 of those who were designated as plaintiffs in this action, showing several of them originally hired in Group A and in various classes in that group. This is an absolutely false statement as there is no person named as plaintiff in these proceedings who attained a seniority date in Group A upon initial hiring, but on the contrary everyone of them were first hired and given seniority dates in Group B."

Mr. Hayes brands as "absolutely false" my statement showing that 13 of the so-called plaintiffs herein were initially employed by the defendant Union Pacific Railroad Company as follows:

Number of So-Called Plaintiffs	Initially Employed In:	
	Group	Class
1	A	2 (Chefs)
2	A	3 (Second Cooks)
4	A	4 (Third Cooks)
6	A	5 (Fourth Cooks)

I have again rechecked the personnel records of the employes involved, as well as the applicable seniority rosters, and the figures shown above are correct in every detail, with one exception: The tabulation above shows that there were six of the so-called plaintiffs initially employed in Group A, Class 5; this figure is in error and should be three employes instead of six. The names and dates of initial employment in Group A of the so-called plaintiffs included in the above tabulation are as follows:

	Initial Employment in Group "A"
Edward M. Jones	8- 5-16
2nd Cooks	
Dewey Berry	11-25-44
Thomas Savage	9-23-44
3rd Cooks	
Albert Ellington	9-17-45
Leodis Kelton	4-18-46
Edgar Nelson	12-18-45
John J. Shanks	5-30-44
4th Cooks	
Clarence O. Buckner	6-16-48
Robert J. Ivory	5-21-48
Eli Woods, Jr.	8- 7-46

(10) Beginning at line 29, page 3, and continuing through line 5, page 4, Mr. Hayes in his affidavit

refers to Exhibit A attached to Mr. Steven R. Auguston's affidavit (verified September 14, 1949) and to the corrected listing which I attached to my affidavit as Exhibit D. Mr. Hayes states, apparently with regard to the individuals listed on these two exhibits, that (line 31, page 3):

"There is not one individual who was at the time of initial hiring given a seniority date in Group A but on the contrary every one of them were initially hired with seniority dates in Group B and the fact that it was not until years afterwards that they were first accorded seniority dates in Group A demonstrates conclusively that they were not originally hired in that group but only in Group B."

In Item 9 of this affidavit I have shown the names of the so-called plaintiffs in this action who, upon original employment with the defendant Union Pacific Railroad Company, were initially employed in and accorded a seniority date in Group A and the statement there made is correct.

(11) At page 5, beginning in line 5, Mr. Hayes discusses and makes numerous statements concerning the reason for his discharge from the service of the defendant Union Pacific Railroad Company in 1936. There is no basis or foundation in fact for Mr. Hayes' assertion in this regard and he was, as I stated in my affidavit, discharged from the defendant's employ in 1936 because he had falsified his age in his employment application. Mr. Hayes was re-hired in 1942; however, he had no previous seniority with the defendant Union Pacific Railroad

Company because of his previous discharge and he was hired as a new employe.

Mr. Hayes was employed in Seniority Group B as a second cook because at that time employment in that Group and Class was the only work opportunity available and there is no foundation in fact for Mr. Hayes' statement that he was put in Group B, Class 2, solely because he was a Negro. The fact is that on October 25, 1942, at the time Mr. Hayes was reemployed, the following white cooks were employed on Group B, 2nd cook positions, in the Omaha seniority district (which was the district Mr. Hayes was reemployed in):

Lewis W. Barta.

Lester From.

Richard D. McCoy.

Ira Peck.

George H. Schultz.

(12) Throughout Mr. Hayes' affidavit many assertions were made concerning the initial hirings of Negro cooks during the four-year period preceding the filing of the complaint herein, and again on page 6, lines 7-15, Mr. Hayes states:

"In short, notwithstanding the misleading if not consciously false statements contained in Mr. Hansen's affidavit, the fact is that during the four-year period prior to the filing of the complaint herein, discrimination against Negroes was rife in the Dining Car Department of defendant Union Pacific Railroad and the only amelioration in this discrimination was belatedly obtained through pressures

brought to bear by me and a host of other Negroes associated with me, all of whom are parties to the present litigation.”

In view of the continued repetition of such statements, it is apparently Mr. Hayes’ present theory that the alleged discriminatory actions of defendant Union Pacific Railroad Company in initially hiring Negro cooks occurred within the four-year period preceding the filing of the complaint. This position is untenable and without any support in fact. I have heretofore shown that during the four-year period next preceding the filing of the complaint:

10 Negro cooks were initially hired in Group AA (see item (2) hereof);

13 Negro cooks were initially hired in Group A, Class 3 (see item (5) hereof);

30 Negro cooks were initially hired in Group A, Class 4 (see item (6) hereof); and

199 Negro cooks were initially hired in Group A, Class 5 (see item (7) hereof and Exhibit B).

Mr. Hayes’ assertion that the:

“* * * only amelioration in this discrimination was belatedly obtained through pressures brought to bear by me”

is entirely false and without any factual foundation whatsoever. There has been no discrimination as Mr. Hayes alleges and the fact that many Negroes were initially employed more than four years ago in Group A, as has been shown heretofore, demon-

strates the complete falsity of Mr. Hayes' reckless statement.

/s/ H. A. HANSEN.

Subscribed and sworn to before me this 12th day of November, 1949.

[Seal] /s/ GEO. W. PETERSEN,

Notary Public in and for said
County and State.

EXHIBIT A

Form 2546-S

Union Pacific Railroad Co.
Seniority Roster

Dining Car Employees Union, Local No. 372
Omaha District

Class: Fourth Cooks & Coach Buffet
Cooks Helpers (Contd)

Seniority District No. 1

Date of Roster January 1, 1948

		Seniority Date		
	Group AA	Group A	Group B	Group C
Yecha, Frank		4-27-38	4-27-38	4-27-38
Washington, Vernon			4-27-38	4-27-38
Benak, John J.		5-17-38	5-17-38	5-17-38
McKain, Wilbur C.		5-20-38	5-20-38	5-20-38
Nedich, Joe		6-10-38	6-10-38	6-10-38
McCoy, Richard D.		7-25-38	7-25-38	7-25-38
Munhall, Kenneth E.	5- 1-41	8-26-38	8-26-38	8-26-38
McCarrell, Henry		5- 5-45	9- 5-38	9- 5-38
Kiger, Howard		6-26-39	6-26-39	6-26-39
Silvus, Ralph L.		8- 1-39	8- 1-39	8- 1-39
Ruvolo, Lewis J.		8- 3-40	8- 3-40	8- 3-40
Bartos, James F.	2-14-47	8- 4-40	8- 4-40	8- 4-40
Swendrowski, Edw. V.		5-16-41	5-16-41	5-16-41
Cherek, Edward F.		5-24-41	5-24-41	5-24-41
Bonge, Richard		2-16-42	2-16-42	2-16-42

Seniority District No. 1

Date of Roster January 1, 1948

	Seniority Date			
	Group AA	Group A	Group B	Group C
Eskesen, Fred B.		6-13-42	6-13-42	6-13-42
Loring, Erwin S.		6-21-42	6-21-42	6-21-42
Nitz, Dale F.		7- 6-42	7- 6-42	7- 6-42
Maroney, Kenneth D.		1-30-45	9-23-42	9-23-42
Hayes, Thomas E.			10-25-42	10-25-42
Watson, Jerome O.			12- 8-42	12- 8-42
Allen, Alfred T.		8- 5-47	2-16-43	2-16-43
Nelson, Eddie		10- 8-47	5-22-43	5-22-43
Carter, John H.			5-25-43	5-25-43
Keller, Rudolph		6- 9-43	6- 9-43	6- 9-43
Johns, Marion J.		9- 1-47	6-11-43	6-11-43
Brown, Sidney		10- 7-43	10- 7-43	10- 7-43
Rivers, Leonard			10-14-43	10-14-43
Morrison, Richard O.		9- 1-47	11- 2-43	11- 2-43
Johnson, Otis			12-12-43	12-12-43
Miller, John L.		9- 1-47	1-31-44	1-31-44
Dedmon, Ira		5- 1-45	2-12-44	2-12-44
Hayes, C. L.			8-10-44	8-10-44
McCarthy, Eugene		12- 9-47	8-16-44	8-16-44
Savage, Thomas		9-23-44	9-23-44	9-23-44
Ballard, Lewis		9- 1-47	10- 4-44	10- 4-44
Fenton, Claude		10-12-44	10-12-44	10-12-44
King, Edmond, Jr.		5-23-46	10-13-44	10-13-44
Christmas, Robert J.		5-23-46	12- 5-44	12- 5-44
Koenig, Michael J.		12-17-46	12-27-44	12-27-44
Beck, Frank J.		8- 6-46	1- 4-45	1- 4-45
Spence, John M.		3- 7-45	3- 1-45	3- 1-45
Vaughn, Roscoe J., Jr.		9- 1-47	3-22-45	3-22-45
Bradford, Henry H.			5- 9-45	5- 9-45
Delaney, Harrison			6- 7-45	6- 7-45
Doolittle, Phillip, Jr.		9- 1-47	7- 3-45	7- 3-45
Gilreath, Junior N.		9- 1-47	7-14-45	7-14-45
Rynarzewski, William A.		5-23-47	8- 1-45	8- 1-45

EXHIBIT B

List of colored cooks initially hired in Group A, Class 5 (Fourth Cooks) during the four-year period preceding the filing of the complaint.

Name	Date
Willie Adams	7-27-47
Deray Aldridge.....	8- 6-47
Eugene M. Aldridge.....	10-25-45
Charles Allen.....	7-21-45
John F. Anderson.....	2- 2-46
Elton Avery.....	2- 1-46
Clarence L. Baker.....	8-13-47
Godfrey Ballard.....	10-24-45
Booker T. Balls.....	12- 4-45
Calvin Bannon, Jr.....	10-14-45
Jerome W. Bartlow.....	8- 1-46
Willie Beaty	12- 4-45
Andrew Billups, Sr.....	9-24-45
William Bishop	12-23-45
Obed Blackmore.....	10- 9-46
Benjamin A. Blunt.....	10-11-45
Delaware Booker	6-10-47
Alfonso Brown	4- 5-48
Harrison Brown.....	5-12-49
Henry Brown, Jr.....	7-23-45
James Brown.....	12- 7-45
Sam H. Brown.....	6-26-47
David Bryant	8-27-47
Volleny Bryan	8-31-46
Clarence O. Buckner.....	6-16-48
Frank A. Burgess.....	2- 4-49

Name	Date
Nedham L. Burnell.....	12-14-45
Thomas O. Carr.....	11-18-45
Agneroldo F. Cathrill.....	8-13-47
William H. Chandler.....	7- 2-48
Henry D. Clopton.....	5-15-47
Willie Cole.....	1-22-46
Arthur Collier.....	5-17-47
Floyd Collins.....	9-22-45
Albert Combs, Jr.....	7-26-48
James P. Connor.....	5-23-48
Osbie Cook.....	7-24-47
James D. Cooper.....	12-25-45
L. D. Cooper.....	12-21-47
Thomas Cummings.....	4-19-46
Garland Davis.....	2-14-46
John H. Davis.....	8-27-47
Tyree Day.....	7- 1-47
Elbert J. Dennis.....	10-23-45
Tracy Dennis.....	3- 7-46
J. B. R. Dickens.....	11- 8-45
Bruce E. Douglas.....	8-28-45
Sherman R. Douglas.....	7- 9-46
Melvin Douglass.....	8-18-45
Charley Dyson, Jr.....	12-14-45
William H. Easter.....	6-19-47
Phennell T. Eaton.....	6-10-47
James Edwards.....	2 -5-47
Paul Edwards.....	8-13-46
Frank A. English.....	1-12-47
William L. Ferguson.....	9- 9-45

Name	Date
Edward J. Freeman.....	11-30-45
Harmon L. Fullove.....	8-18-47
Ulyses G. Garrison.....	7- 5-48
David E. Gilliard.....	8- 1-48
Booker T. Gilmore.....	9-13-47
Leroy L. Gordon.....	10-14-45
William Graham.....	10-11-45
Albert Gray.....	12-18-47
Carnell Green.....	5-10-48
Robert Green, Jr.....	5-16-47
Elmer L. Griffie.....	10-25-45
James N. Grimes.....	4-19-46
Joseph A. Hall.....	7- 3-47
J. B. Hanson.....	8-22-45
George Harris.....	7-17-46
Johnnie L. Harris.....	10- 5-45
Henry H. Haynes.....	8-26-45
Elijah Henderson.....	8-10-45
John L. Hilliard.....	5-17-47
Daniel H. Holcey.....	8- 5-47
Joe Holmes, Jr.....	8-27-46
Benjamin F. Holt.....	9-21-46
John Huston.....	6-29-46
Roscoe Howard.....	5-22-46
Jesse J. Hunter.....	7-20-46
Robert J. Ivory.....	5-21-48
Orville V. Jackson.....	9-21-45
Walter D. Jackson.....	9-18-46
William E. Jackson.....	2- 1-47
Booker T. Johnson.....	8-14-47

Name	Date
Clyde W. Johnson.....	4-13-46
Herbert S. Johnson.....	12-18-45
Jack Johnson.....	8- 5-46
LeRoy E. Johnson.....	10- 6-48
Louis Johnson.....	10- 8-45
Refus Joe.....	7-27-47
Allen Jones	2- 5-46
Charlie Jones	2- 3-46
Clem F. Jones.....	7-22-45
Jack L. Jones.....	7- 6-45
James Jones	8-17-45
Royal A. Jones.....	5-18-47
William M. Jones.....	12-13-45
Tyree Kellum	2-15-46
James E. Lamb.....	2-27-46
Emmerson Lee	3- 6-47
Thomas Lee.....	5-17-47
Elisha J. Lewis.....	7-23-48
Robert L. Lewis.....	1- 1-46
William T. Lewis.....	6-16-47
Charles Liles.....	4- 2-46
Thomas E. Lipscomb.....	8-25-46
Guss Lockridge.....	7-23-45
Gartroll Logan	8-26-45
John Long	3-30-46
Monroe Malone.....	1-10-49
Jeff D. Marshall.....	8- 2-45
Edwin J. Martin.....	8-22-48
Thomas L. Matthews.....	1-11-48

Name	Date
William R. McCauley.....	9- 8-45
Robert J. McCray.....	8-25-45
Preston J. McDowell.....	9-11-48
Edward McElroy	3-12-48
Will McKinney.....	11-13-45
Edward McKnight.....	9-25-45
Roger Q. Mills.....	4- 2-48
Carl C. Minor.....	9-15-45
Roscoe C. Mitchell.....	8-15-45
Quint L. Moore.....	10- 3-47
R. E. Moore.....	7-31-48
Robert L. Moore, Jr.....	10-29-45
Hilliard Moss.....	10-30-45
Isaiah Von Napper.....	12-21-45
Lentor P. Nash.....	9-16-45
Bonnie D. Nelson.....	1-26-46
Gilbert Nelson, Jr.....	7-24-45
Halsie B. Owens.....	7-21-47
Halsie M. Owens.....	1- 5-49
Hobart C. Owens.....	11- 2-47
Walter E. Palmer.....	9- 5-47
Archie D. Parker.....	5-14-47
Royal J. Paul.....	8-22-45
Thomas Perry	8-14-45
William H. Phillips.....	6-29-47
LeRoy Porter.....	9-11-45
Milton Porter.....	11-19-45
Theodore Porter.....	10-19-46
Elliot J. Prellow.....	9-19-46
Gauvene Prentis.....	10-24-45

Name	Date
Sylvestor Randell.....	7- 2-48
Joseph R. Rankin.....	7-26-46
Albert Reed.....	11- 4-45
Willis E. Reed.....	6-14-47
Eddie B. Richey.....	8-26-45
James J. Roberson.....	7-11-48
Ambrous L. Roberts.....	6-27-47
Eugene M. Roberts.....	7-10-48
Dewitt Robinson.....	2- 5-46
Earnest A. Robinson.....	8- 7-45
Edward M. Rose.....	5-29-48
Cecil M. Samples.....	7- 5-47
Henry Scott.....	7-25-45
John W. Scott.....	10- 2-45
William J. Scott.....	4- 4-46
William O. Scruggs.....	5-14-47
Marvin Seward.....	8-15-47
Armsted Shaw.....	2- 6-47
Eliga Shelton.....	6-30-48
Ermon Shelton.....	7- 7-46
Andrew Smith.....	9-16-45
Cecil Smith.....	8-29-46
James Smith.....	9-18-45
James Smith, Jr.....	7- 2-47
Joe Smith.....	8-23-45
Nathan A. Smith.....	7-30-47
Richard Smith.....	1-12-46
Wiliam Smith.....	2-26-46
Clifford Stegger.....	11-27-45
David Stevens.....	9- 1-45

Name	Date
J. B. Taylor.....	7- 7-47
John O. Taylor.....	9-19-46
Clyde M. Thomas.....	9-14-45
James E. Thomas.....	5-18-45
James M. Thomas.....	10- 5-45
James W. A. Vaughn.....	6-23-47
Neal D. Vaughn.....	5-15-47
George Walker.....	7- 1-48
William R. Walker.....	10- 1-46
George Washington.....	12-29-45
Linnie B. Washington.....	10-30-47
Rand Washington.....	12- 5-45
James Waters.....	9-27-46
Frank Watkins.....	7-21-47
Greene Webster.....	11-17-45
Clarence O. Whitner.....	6-19-48
Leroy Wilcher.....	3-12-46
Emmett L. Williams.....	7-28-46
Horace C. Williams, Jr.....	9-19-47
James Williams (1).....	9-10-45
James Williams (2).....	7-24-45
Woodrow E. Wilson.....	8-26-46
Walter Winston.....	10-27-48
Eli Woods, Jr.....	8- 7-46

[Endorsed]: Filed November 15, 1949.

[Title of District Court and Cause.]

OPINION

Action for injunction and for other relief for discrimination against Negro employees. Action dismissed in accordance with opinion.

Harold M. Sawyer, Gladstein, Andersen, Resner & Sawyer, all of San Francisco, California, attorneys for petitioners.

T. W. Bockes, W. R. Rouse, Elmer Collins, James A. Wilcox, all of Omaha, Nebraska, and E. E. Bennett, Edward C. Renwick, Malcolm Davis, and W. J. Schall, all of Los Angeles, California, attorneys for respondent Union Pacific Railroad Company.

Marion B. Plant, Brobeck, Phleger & Harrison, all of San Francisco, California, attorneys for respondent Dining Car Employees Union Local 372.

Memorandum Opinion

Roche, District Judge: This is an action to prevent, and secure damages for, unlawful discrimination under the Railway Labor Act, 45 U.S.C.A. §151 et seq. Petitioner Hayes is a Negro member of the respondent Dining Car Employees Union Local 372 (hereinafter referred to as "Union") and is employed by respondent Union Pacific Railroad Company (hereinafter referred to as "Railroad") in its dining car and commissary service. He brings this action on behalf of himself and all other Negro employees similarly situated.

Respondents have filed certain motions to strike and have moved to dismiss the action on the grounds of (1) failure to state a cause of action upon which relief may be granted and (2) lack of jurisdiction of the Court over the subject matter. In resisting these motions the petitioners rely entirely on the decisions of the Supreme Court in *Steele v. L. & N. R. Co.*, 323 U.S. 192, and *Tunstall v. Brotherhood*, 323 U.S. 210. Indeed, petitioners go so far as to assert that unless they bring themselves within the principle of the *Steele* and *Tunstall* cases, *supra*, there is no authority on which jurisdiction of this Court can rest. The fundamental question of jurisdiction thus depends on whether the record before this Court discloses a factual situation within the scope of the cited authorities. The *Steele* and *Tunstall* cases, *supra*, involved collective bargaining agreements that were discriminatory by their terms. There is no allegation in the present case that the collective bargaining agreement executed by Union and Railroad on June 1, 1942, and still in effect, discriminates against petitioners. They allege, instead, that discrimination has been effected by the conduct of the respondents under the agreement, and contend that this is sufficient, under the Supreme Court decisions, to give this Court jurisdiction. The alleged discrimination arises in connection with respondent Railroad's seniority assignments and promotions.

It appears from the record that the collective bargaining agreement provides that, as of the date of his hiring (whether before or after the date of

the Agreement), each member of the Union employed by Railroad shall be assigned a seniority date in a seniority group and class. There are four seniority groups: AA (selective runs covering streamliner trains), A (standard dining car runs), B ("challenger" runs covering the so-called challenger type trains which Railroad discontinued in 1947), and C (miscellaneous, covering such types as cafe-lounge cars). Each group contains certain seniority classes, such as: Class I (chef-caterer), Class II (chef), and Class III (second cooks, etc.). The Agreement further provides the system by which employees can advance to a higher seniority classification. Non-temporary and certain other types of positions which become vacant are announced by means of a bulletin. Bids are then accepted from employees desiring to be considered for such vacancies. Promotion and assignment are based on seniority, fitness and ability; fitness and ability being sufficient, a seniority prevails. Assignment to a non-temporary position of a seniority higher than that held gives to the employee so assigned such higher seniority classification and seniority date.

Petitioners allege that at the time of their original hiring only white members of the Union have been assigned to Group A, Classes I or II, while all Negro members have been assigned to Group B, Class III. They further allege that Railroad has refused to accept petitioners' bids for bulletined positions in higher seniority classifications, while filling such positions with Union's white members

having lesser seniority than have petitioners, and that Railroad has employed petitioners in Group A, Classes I and II positions without any criticism of their fitness and ability but without assigning them such seniority classification. Petitioners further charge that they have been so deprived of their seniority rights solely because they are Negroes and that this has been done by Railroad in connivance with the Union.

Turning now to the Steele and Tunstall cases, *supra*, upon which the petitioners ground their right of action, we find certain points of similarity and one of vital difference. In those cases the petitioners were Negro firemen employed by the respondent railroads, whose established practice was to promote only white firemen to engineers. The respondent Brotherhood, which excluded Negroes from its membership, was the authorized, exclusive bargaining representative of the craft of firemen employed by the railroads. The Brotherhood and the railroads entered into agreements restricting the seniority rights and the employment of Negro firemen, without giving them prior notice or opportunity to be heard.

The facts before this Court show that the respondent Union is the authorized, exclusive bargaining representative for all of Railroad's employees in its dining car and commissary service and that Negro employees are admitted to Union membership without discrimination. They further show the existence of a collective bargaining agreement between Union and Railroad but the record

contains no allegations that such agreement discriminates against petitioners. Since the petitioners have amended their original complaint twice and have filed a supplemental complaint, the absence of such allegations indicates that the agreement is not discriminatory. The Court believes that this difference between the facts in the instant case and those before the Supreme Court in the Steele and Tunstall cases, *supra*, is decisive on the issue of jurisdiction.

The Steele case, *supra*, holds that the Railway Labor Act imposes on the statutory representative of a craft (i.e., the authorized, exclusive bargaining representative) the duty to represent, in collective bargaining and in making contracts, all employees in the craft, without discrimination because of their race. The Tunstall case, *supra*, holds that the federal courts have jurisdiction to entertain a non-diversity suit for the violation of such duty by the statutory representative of a craft, since it is the federal statute, the Railway Labor Act, which condemns as unlawful such conduct by the representative.

The Railway Labor Act is not a Fair Employment Practices Act. It imposes no duty upon the employer to act without discrimination, nor do the Steele and Tunstall cases, *supra*, so hold. The decision of the Steele case affected the employer railroad only by the holding that the railroad could not take the benefits of a contract which the bargaining representative is prohibited by the statute from making (which is simply the statement of an ele-

mentary principle of contract law.) Such duty not to discriminate on the basis of race is imposed only on the statutory representative and only with respect to collective bargaining and the making of contracts. It is to be observed that while the facts of those cases were that the employer railroads practiced discrimination in the assignment and promotion of employees, and that the union Brotherhood practiced racial discrimination in its membership, the Supreme Court did not extend its ruling to include such practices in the prohibited area, but limited the rule to contracting and collective bargaining by the bargaining representative. Any doubt on this point was removed by the Supreme Court itself in *Graham v. Brotherhood of Locomotive Firemen and Enginemen*,.....U. S..... (November 7, 1949), where the Court, referring to the *Steele* and *Tunstall* cases, *supra*, said: "We held there that, as the exclusive statutory representative of the entire craft under the Railway Labor Act, the Brotherhood could not bargain for the denial of equal employment and promotion opportunities to a part of the craft upon grounds of race."

In the *Steele* and *Tunstall* cases, *supra*, the bargaining representative had made contracts which clearly violated this described duty. In the instant case neither the original complaint nor its amended forms contain any allegations that the respondent Union has violated this duty through collective bargaining or contracting. The sole allegation made

against the Union is that it has acted "in connivance" with the Railroad in the practices allegedly committed by the Railroad.

An examination of the word "connivance" shows its definition to be: "corrupt or guilty assent to wrongdoing, not involving actual participation in it, but knowledge of, and failure to prevent or oppose it," Webster's New International Dictionary; "an agreement or consent, indirectly given, that something unlawful shall be done by another," Bouvier's Law Dictionary; "Connivance with others may be committed by passive permission, or failure to prevent, or helping by not hindering when it is one's duty to prevent, or by negligence or voluntary oversight," *Brandon v. Holman*, 41 F (2d) 586, 588. This word cannot, without severe strain, be taken to mean "participation through contracting." Simply stated, the complaint alleges only that the Union has permitted, through failure to prevent, the existence of the alleged discriminatory practices of the Railroad.

As stated by the Supreme Court in *Terminal Assn. v. Trainmen*, 318 U. S. 1, 6: "The Railway Labor Act, like the National Labor Relations Act, does not undertake governmental regulations of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them. The national interest expressed by those Acts is not primarily in the working conditions as such. So far as the Act itself is concerned these conditions may be as bad as the employees will tolerate or be made as good as

they can bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions. The federal interest that is fostered is to see that disagreement about conditions does not reach the point of interfering with interstate commerce." This Court, therefore cannot compel the statutory representative to bargain for certain standards of wages, hours, or working conditions, *Terminal Assn. v. Trainmen*, *supra*, nor, as here, racial equality in the classification of employees.

Thus there is a failure of the complaint to allege any violation of that duty as described by the *Steele* and *Tunstall* cases, *supra*, and there is an absence of any rights which have been violated by the Railroad. At most the complaint, in its original and amended form, alleges a violation of provisions of the Agreement. Any right of action, if one exists, is based on the alleged breach of the Agreement and does not arise under the Railway Labor Act, but only from the consequent contractual relations of the parties. *Gully v. First National Bank*, 299 U. S. 109; *Malone v. Gardner*, 62 F (2d) 15; *Barnhardt v. Western Maryland Ry. Co.*, 128 F (2d) 709; *Burke v. Union Pac. R. Co.*, 129 F. (2d) 844. Since this is not an action arising under any Act of Congress regulating commerce, the Court has no jurisdiction under 28 U. S. C. § 1337. Nor have the petitioners alleged facts necessary to give the Court Jurisdiction under the diversity of citizenship provision, 28 U. S. C. § 1332. The question of jurisdiction being decisive, it is not necessary to consider

the other motions and respondents' motion to dismiss the action must be granted. It is so ordered.

Dated: January 19th, 1950.

/s/ MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed January 19, 1950.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR LEAVE TO FILE
AN AMENDED COMPLAINT

To Defendant Union Pacific Railroad Co., and to Edward C. Renwick, Esq., Its Attorney, and to Defendant Dining Car Employees Union Local 372 and to Messrs. Brobeck, Phleger & Harrison and Marion B. Plant, Esq., its Attorneys:

You and Each of You Will Please Take Notice that on Monday, February 13, 1950, at the hour of 10 a.m., or as soon thereafter as counsel can be heard, in the courtroom of the above-entitled Court, in the Post Office Building, 7th and Mission Streets, San Francisco, California, plaintiffs will move the above-entitled Court for leave to file an amended complaint in the form hereto attached and verified by plaintiff Thomas E. Hayes on January 25, 1950.

[Endorsed]: Filed January 31, 1950.

This motion will be based upon all the records, files, papers and proceedings herein and upon the

amended complaint, copy of which is hereto attached.

Dated: January 30, 1950.

GLADSTEIN, ANDERSEN,
RESNER & SAWYER,

/s/ HAROLD M. SAWYER,
Attorneys for Plaintiffs.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed January 31, 1950.

In the District Court of the United States for
the Northern District of California, Southern
Division

Civil No. 28990-R

THOMAS E. HAYES, ALFRED ALLEN, BEN-
NIE BATES, MAX D. BANKS, WALTER
G. BASSETT, LEWIS BALLARD, CLAR-
ENCE O. BUCKNER, JOHN BUKEY,
HENRY BURNETT, RICHARD BURTON,
WILLIE R. BURTON, JESS CLARK, M. G.
CLAYTON, TOM D. CLERKLEY, RAY-
MOND CORBIN, FLENOID CUNNING-
HAM, JOHN H. DALE, WALTER DEAN,
PHILIP DOOLITTLE, TED EATON, AL-
BERT L. ELLINGTON, ROBERT M.
EWING, LEROY FISHER, WAYMON
FLEMING, FREDDIE FRANKS, LANG-
STON GARDNER, JUNIOR N. GIL-
BREATH, DENNIS HALL, ELBERT L.

HOLLIDAY, HORACE GIPSON, THOMAS JACKSON, ROBERT L. IVORY, MARION L. JOHNS, CHARLES JOHNSON, DONALD W. JOHNSON, EDWARD M. JONES, THEODORE R. JONES, HENRY O. JURY, ALBERT J. KENNEDY, EDMOND KING, JR., L. A. KING, RAASNETH KIRK, EMMETT L. LARK, ROBERT LILLARD, JOHN H. LOFTON, HURDO LEE LONGMIRE, JOEL MANNING, OSCEOLA MANNING, FREDERICK J. MAY, HAYWARD D. MAYNOR, WALTER M. MOORE, JOHN W. MORGAN, RICHARD O. MORRISON, BELFORD N. MOSES, LEONARD A. NELSON, LAWRENCE NOLBERT, OLIVER E. ODOM, CHARLES N. PANKEY, JR., DOUGLAS REDDEN, CHARLES M. RENFRO, LEONARD RIVERS, ISAIAH RIVERS, BENNIE ROBINSON, HARVEY H. ROBINSON, FRANK SANDERS, JUNIOR; JOHN J. SHANKS, JOHN A. SHAW, ABLERT SMITH, CHARLES R. SMITH, FRENCH L. SPENCER, THOMAS R. SPIKES, VERNON STAMPS, AMOS STONER, WILLIE M. SWANSON, KONWOOD THOMAS, HARVEY H. TRAMMELS, ROBERT C. TURNER, FRANK VALENTINE, LIVINGSTON S. VAUGHN, ROSCOE J. VAUGHN, JR., JAROME O. WATSON, HENRY D. WILEY, J. M. WILLIAMS, HENRY L. WILLIAMSON, CHARLES WINSTON,

ELIE WOODS, JR., PALL E. WOODS, and
CHARLES P. WESTBROOKS, ON BE-
HALF OF THEMSELVES, AND ON BE-
HALF OF ALL OTHERS SIMILARLY
SITUATED WHO MAY HEREAFTER BE-
COME PARTIES PLAINTIFF TO THIS
ACTION,

Plaintiffs,

vs.

UNION PACIFIC RAILROAD CO., a Corpora-
tion;

DINING EMPLOYEES UNION LOCAL 372, a
Voluntary Unincorporated Labor Organization;
JAMES G. BARKDOLL, as District Director
of Said Local 372 in the District of Los An-
geles, State of California,

Defendants.

AMENDED COMPLAINT TO PREVENT, AND
SECURE DAMAGES FOR, UNLAWFUL
DISCRIMINATION UNDER THE RAIL-
WAY LABOR ACT

As and for a First Cause of Action Against Defend-
ants, Plaintiffs Allege:

I.

Plaintiffs named above, all of whom have au-
thorized in writing the filing of this complaint in
their behalf, bring this action on behalf of them-
selves and on behalf of all other employees of de-

fendant Union Pacific Railroad Company (hereinafter referred to as "Railroad") similarly situated and who may hereafter become parties plaintiff to this action.

II.

Plaintiffs bring this action (1) to prevent the discriminatory application by defendants, solely because of the race of plaintiffs, of seniority rules so as to deprive plaintiffs of their rights to exercise seniority in accordance with the terms of a collective bargaining agreement between defendants, (2) to recover damages from defendants for such discriminatory application of seniority rules, and (3) for a declaration that the practices of defendants complained of herein are without warrant in law.

III.

Jurisdiction is conferred on the Court by §1337, 28 USCA (Judicial Code), giving the District Court original jurisdiction of any civil action arising under any act of Congress regulating commerce, and by §2 of the Railway Labor Act, 45 USCA §151 (a).

IV.

At all times herein mentioned defendant Railroad was and now is a corporation engaged in interstate commerce, organized under the laws of a state unknown to plaintiffs, and duly and regularly admitted to do business in the State of California as a foreign corporation; and defendant Dining Car Employees Union Local 372 (hereinafter referred to as "Union") was and is a voluntary non-incor-

porated association and labor organization acting as the exclusive collective bargaining agent, pursuant to the terms and provisions of said Railway Labor Act, for plaintiffs and all other employees of Railroad engaged in dining car and commissary service, and functioning as such collective bargaining agent in the State of California and within the jurisdiction of this Court.

V.

The members of the Union are too numerous to permit of bringing them all before the Court as defendants, and jurisdiction of the person of Union is conferred upon the Court by service of process upon a member and officer of Union, namely James G. Barkdoll, District Chairman of Union for Los Angeles, California, District.

VI.

All of the plaintiffs are members of the Negro race and they are employees of the Railroad in its dining car and commissary service, or former employees of Railroad in said services who have, by reason of discriminatory practices by Railroad and Union, been deprived of their seniority rights and by reason thereof have either left or been discharged from their employment by Railroad, and plaintiffs at all times mentioned herein are either members of Union or former members thereof and entitled to representation by Union as their collective bargaining agent, without discrimination. As employees of Railroad, plaintiffs were at all times mentioned herein engaged in interstate commerce.

VII.

At all times herein mentioned there was and now is in full force and effect a written collective bargaining agreement (hereinafter called the "Agreement") executed by Railroad and Union effective June 1, 1942.

VIII.

In some instances plaintiffs had, prior to June 1, 1942, established an employment relationship with Railroad and were in such relationship on June 1, 1942, and the remainder of plaintiffs have since June 1, 1942, established an employment relationship with Railroad in accordance with the terms of Part I, Article III, Rule 14, subdivision (a) of said Agreement; and at the time when said employment relationship was created, plaintiffs were and each of them was accorded a seniority date in accordance with the terms of Part I, Article IV, Rule 17 in the seniority group and class designated by Railroad at the time when the employment relationship was created.

IX.

At the time when the plaintiffs herein established an employment relationship with Railroad they were by Railroad, in connivance with Union, assigned to that certain seniority group known as group B, as defined in Part I, Article IV, Rule 19, of said Agreement, whereas white persons, at the time when they established an employment relationship with Railroad, were assigned by Railroad, with the connivance of Union, to seniority Group A, as defined in said Rule 19.

Moreover, plaintiffs at the time they established their employment relationship, were by Railroad, and in connivance with Union, assigned to the fourth seniority class, as defined in Part I, Article IV, Rule 20 of said Agreement, whereas white persons in the dining car service of Railroad were, at the time their employment relationship was created, assigned by Railroad, in connivance with Union, either to Class I, Class II, or Class III, as defined in said Rule 20; and by reason of the discriminatory treatment given to the said white persons, their pay and allowances were materially larger than the pay and allowances of plaintiffs, although there was no distinction between the ability and competence of plaintiffs and said white persons.

X.

Under the terms of said Agreement, and particularly Part I, Article IV, Rule 17, subdivision (c), it was impossible for plaintiffs to obtain a seniority date and accumulate the seniority in a higher class than that to which they were assigned at the inception of their employment relationship, except in accordance with the terms of said Rule 17, which provides that an employee will be accorded a seniority date in a higher group or class in which he has not previously acquired a seniority date only upon assignment by bulletin to a bulletin position or vacancy in such higher group or class and the seniority date so accorded will be the date of assignment and will also be accorded in all intermediate groups and classes, and an employee assigned to a position in a

higher group or class will retain the seniority dates held in all lower groups and classes and continue to accumulate seniority therein.

By reason of the above-described discrimination against Negroes practiced by Railroad, in connivance with Union, plaintiffs have, since their initial employment by Railroad, been unable to build up seniority in seniority groups and classes higher than those in which they were originally given seniority dates, and hence never, as long as they remain in Railroad's employ, will be able to exercise seniority rights in higher groups and classes in competition with white employees.

XI.

Not only has Railroad, in connivance with Union, denied seniority rights to plaintiffs, as alleged in paragraph IX hereof but has, at the same time, in connivance with Union, employed plaintiffs in seniority Group A, as defined in such Rule 19, and in Classes I, II, and III, as defined in said Rule 20, but without assigning to plaintiffs any seniority date in said groups and classes, and has thereby, in connivance with Union, prevented plaintiffs from from accumulating seniority in said groups and classes.

XII

That said agreement provided in Part I, Article V, Rule 26 thereof, that promotion shall be based upon seniority, fitness and ability, fitness and ability being sufficient, seniority shall prevail; but with reference to these plaintiffs, Railroad, in connivance with

Union, has denied plaintiffs seniority in higher classes and groups while at the same time has employed plaintiffs in such higher classes and groups for long periods of time without any criticism of their fitness and ability, and the reason for the said discrimination against plaintiffs was and is because they are Negroes, and it is and has been the purpose of Railroad and Union to drive plaintiffs and all other Negroes from service in the employment of Railroad in its dining car department, except in inferior groups and classes, and that this policy was devised and has been enforced with express malice against plaintiffs, and for the purpose of oppressing them.

XIII

Union is controlled by persons wholly in sympathy with the said policy of discrimination against plaintiffs, and notwithstanding repeated protests of plaintiffs and their representatives, and requests to take action against Railroad, Union has utterly failed, refused and neglected to take any such action, and Railroad and Union have together failed, neglected and refused to refrain from said discriminatory practices, and plaintiffs have no administrative remedy save and except before such bodies of Union and Railroad as have already acquiesced in and perpetrated said discriminatory practices; and without the interposition of this Court, and without the exercise of its equity jurisdiction in the premises, plaintiffs have no plain, speedy or adequate remedy at law.

XIV

The employment records of plaintiffs are wholly within the possession and control of Railroad and without discovery of said records plaintiffs are unable to calculate and state the damages which they and each of them have suffered by reason of the aforesaid discriminatory practices within four years immediately preceding the filing of this complaint.

Wherefore, plaintiffs pray, etc.

As and for a Second Cause of Action Against Defendants, plaintiffs allege:

I.

Incorporate by reference, as though here set forth at length, all the allegations contained in paragraphs I, II, III, IV, V, VI, VII and VIII of the first cause of action herein.

II.

Prior, however, to the effective date of the said agreement, defendants Railroad and Union had, by mutual understanding and verbal agreement, conspired together to discriminate against Negro employees in the dining car department of Railroad by arbitrarily assigning to Negroes, when first employed by Railroad, seniority dates in Group B, as defined in Part I, Article IV, Rule 19, of said Agreement, and in Classes 4 and 5, as defined in Part I, Article IV, Rule 20 of said Agreement, whereas white persons when first employed were arbitrarily assigned seniority dates in Group A as defined in said Rule 19, and in Classes 2 and 3, as

defined in said Rule 20; and by reason of the discrimination thus practiced by Railroad and Union against Negroes and in favor of white persons, the pay and allowances of the latter were materially larger than the pay and allowances of the former, although the Negroes were no less competent, able and experienced than the white persons. The basis for the said discrimination against the Negroes was solely because of their race.

The said Agreement did not provide any standard or yardstick by which it could be determined in which of the several seniority groups and classes new employees should be given seniority dates.

But the said agreement was negotiated in the light of the existing practice, and the existing practice was, by Railroad and Union during said negotiations and after the effective date of the Agreement, adopted by verbal agreement and understanding between Railroad and Union, as the method of determining seniority dates in the several groups and classes defined in said Rules 19 and 20; and by this adoption by Railroad and Union, the said Agreement was modified in violation of the Railway Labor Act and for the purpose of discriminating against Negro employees in the dining car department of Railroad; and thus modified, the entire contract was, has been ever since its effective date, and now is, discriminatory against Negroes in the employ of defendant Railroad in its dining car department.

That the whole purpose of incorporating in the said Agreement Rules 19 and 20, was to give recognition to the said discriminatory practice which had

previously existed prior to the effective date of said Agreement, and that the said Agreement was negotiated and entered into by Railroad and Union for the express purpose of perpetuating the said discriminatory practice and using the same as the standard or yardstick for the determination in which of the several seniority groups and classes new employees should be given seniority dates.

That in accordance with the said discriminatory agreement, plaintiffs at the time they established their employment relationship, were by Railroad, and pursuant to said Agreement with Union, assigned to that certain seniority group known as B, as defined in said Rule 19, whereas white persons were at the time when they established an employment relationship, assigned by Railroad pursuant to said Agreement, to seniority Group A, as defined in said Rule 19.

Moreover, plaintiffs at the time they established their employment relationship, were by Railroad, pursuant to said Agreement with Union, assigned to the fourth and fifth seniority classes, as defined in said Rule 20, whereas white persons in the dining car service of Railroad were at the time their employment relationship was created, assigned by Railroad, pursuant to said Agreement with Union, either as Class 2 or Class 3 employees, as defined in said Rule 20; and by reason of the said discriminatory treatment, and in accordance with the said discriminatory Agreement, the pay and allowances of white persons were materially larger than the pay and allowances of plaintiffs, although there was no dis-

inction between the ability and competence of plaintiffs and said white persons.

III.

Under the terms of said Agreement, and particularly Part I, Article IV, Rule 17, subdivision (c), it was impossible for plaintiffs to obtain a seniority date and accumulate the seniority in a higher class than that to which they were assigned at the inception of their employment relationship, except in accordance with the terms of said Rule 17, which provides that an employee will be accorded a seniority date in a higher group or class in which he has not previously acquired a seniority date only upon assignment by bulletin to a bulletin position or vacancy in such higher group or class and the seniority date so accorded will be the date of assignment and will also be accorded in all intermediate groups and classes, and an employee assigned to a position in a lower group or class will retain the seniority dates held in all lower groups and classes and continue to accumulate seniority therein.

However, plaintiffs have been and always will be, as long as they remain in the employ of Railroad, at a serious disadvantage in competition with white persons because they, as a result of the said discriminatory Agreement, will be unable to compete with white employees in the dining car service of Railroad and build up seniority in higher seniority groups and classes than those to which they were initially assigned; whereas white persons employed

initially in higher groups and classes, will from the very day of their first employment, begin to build up seniority in such higher groups and classes to such an extent that the Negro employees have not been, are not, and will never be able to compete with the said white employees with respect to bulletined positions in the higher seniority groups and classes.

IV.

Incorporate by reference, as though here set forth at length, all the allegations contained in paragraphs XII and XIII of the first cause of action herein. .

V.

The employment records of plaintiffs are wholly in the possession and control of Railroad, and without discovery of said records, plaintiffs are unable to calculate and state the damages which they and each of them have suffered by reason of the premises within four years immediately preceding the filing of this complaint.

Wherefore, plaintiffs pray for the following relief:

(1) For a declaratory judgment that the said discriminatory Agreement negotiated by Union, as sole collective bargaining agent for plaintiffs, was and is illegal and a violation by Union of its responsibilities as sole collective bargaining agent, and that Railroad cease and desist from the discrimination permitted by said contract against said plaintiffs,

and further for an order according plaintiffs, and each of them, such seniority dates in such class or classes and group or groups as they would have been entitled to had there been no discrimination against them by defendants.

(2) For a temporary restraining order, restraining Railroad and Union from engaging in discrimination in the application of seniority rules to plaintiffs until the further order of this Court.

(3) For an injunction pendente lite restraining Railroad and Union from engaging in discrimination in the application of seniority rules to plaintiffs until the further order of this Court.

(4) For a permanent injunction forever restraining Railroad and Union from engaging in discrimination in the application of seniority rules to plaintiffs.

(5) For a reference to a United States Commissioner or other authorized officer to take testimony and report to the Court upon the damages sustained by Plaintiffs and each of them by reason of said discriminatory practices in the application of seniority rules to plaintiffs.

(6) For a judgment for such damages thus ascertained by said Commissioner or other authorized person.

(7) For a decree for punitive or exemplary damages on behalf of each of the plaintiffs entitled to re-

cover herein in such amount as to the Court may seem appropriate.

(8) For costs of suit and disbursements incurred herein, together with interest on any damages allowed plaintiffs from the date when they should have been accorded seniority rights under the terms of said Agreement, and for the allowance of a reasonable attorney's fee.

(9) For such other and further relief as to this Court may seem meet and just in the premises.

Dated: January 25, 1950.

GLADSTEIN, ANDERSEN,
RESNER & SAWYER,

/s/ HAROLD M. SAWYER,
Attorneys for Plaintiffs.

State of California,

City and County of San Francisco—ss:

Thomas E. Hayes, being first duly sworn, deposes and says:

That he is one of the plaintiffs named in the within and foregoing first amended complaint; that he makes this verification for and on behalf of all plaintiffs herein; that he has read said complaint and knows the contents thereof; that the same is true of his own knowledge except as to matters

therein stated upon information or belief, and as to those matters he believes it to be true.

/s/ THOMAS E. HAYES.

Subscribed and sworn to before me this 25 day of January, 1950.

[Seal] AGNES QUAVE,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commision Expires January 14, 1953.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 31, 1950.

[Title of Court of Appeals and Cause.]

Civil No. 28990-R

AMENDED NOTICE OF MOTION TO SET
ASIDE ORDER OF DISMISSAL AND FOR
LEAVE TO FILE AN AMENDED COM-
PLAINT.

To Defendant Union Pacific Railroad Co., and to
Edward C. Renwick, Esq., its Attorney, and to
Defendant Dining Car Employees Union Local
372 and to Messrs. Brobeck, Phleger & Harrison
and Marion B. Plant, Esq., its Attorneys:

You and each of you will please take notice that
on Monday, February 13, 1950, at the hour of 10
a.m., or as soon thereafter as counsel can be heard

in the courtroom of the above-entitled Court, Post Office Building 7th and Mission Streets, San Francisco, California, plaintiffs will move the Court to set aside the order of dismissal made and entered herein on January 19, 1950, and for leave to file an amended complaint in the form attached to a similar notice filed herein January 31, 1950, verified by Thomas E. Hayes on January 25, 1950.

This amended notice is given because of the inadvertent omission in the said notice filed January 31, 1950, of any reference to the said order of dismissal of January 19, 1950, and the motion will be made upon all the records, files, papers and proceedings herein and upon the said form of amended complaint.

Dated: January 31, 1950.

GLADSTEIN, ANDERSEN,
RESNER & SAWYER,

/s/ HAROLD M. SAWYER,
Attorneys for Plaintiffs.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Feruary 2, 1950.

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in this City and County of San Francisco, on Monday, the 13th day of February, in the year of our Lord one thousand nine hundred and fifty.

[Title of Cause.]

ORDER DENYING MOTION TO SET ASIDE
JUDGMENT OF DISMISSAL, AND FOR
LEAVE TO FILE AMENDED COMPLAINT

Case came on for hearing of motion to set aside judgment of dismissal and for leave to file amended complaint. Harold Sawyer, Esq., for plaintiff, Edward Renwick, Esq., for Union Pacific Railroad Company, and Marion B. Plant, Esq., for the Dining Car Employees Union, were present. After hearing counsel for respective parties it is Ordered that the motion to set aside judgment of dismissal and for leave to file amended complaint be denied. Thereupon, the judgment of dismissal was signed and filed.

In the Southern Division of the United States District Court for the Northern District of California.

No. 28990-R

THOMAS E. HAYES, on Behalf of Himself and All Others Similarly Situated Who May Come in and Prosecute This Action and Contribute to the Costs Thereof,

Plaintiffs,

vs.

UNION PACIFIC RAILROAD CO., a Corporation, and DINING CAR EMPLOYEES UNION LOCAL 372, a Voluntary Unincorporated Labor Organization; JAMES G. BARKDOLL, as District Director of Said Local 372 in the District of Los Angeles, State of California,

Defendants.

JUDGMENT OF DISMISSAL

The defendants, Union Pacific Railroad Company, a corporation, and Dining Car Employees Union Local 372, a voluntary unincorporated labor organization, having each moved to dismiss the above-entitled action upon the ground of failure to state a claim upon which relief can be granted and upon the ground of lack of jurisdiction over the subject matter, and said motions having come on duly and regularly for hearing, the parties were given reasonable opportunity to present all pertinent material; and it appearing to the Court after consider-

ing the complaint, the amendments thereto, the affidavits filed by the parties, and the statements of counsel, that there is no genuine issue as to any material fact and that the said defendants are entitled to a judgment of dismissal as a matter of law, and the Court having ordered that said motions be granted upon all grounds above stated,

Now, therefore, it is ordered, adjudged and decreed that the said action be, and the same hereby is, dismissed, and that the said defendants, Union Pacific Railroad Company, a corporation, and Dining Car Employees Union Local 372, a voluntary unincorporated labor organization, have and recover of plaintiffs their costs herein incurred.

Dated this 13th day of February, 1950.

/s/ MICHAEL J. ROCHE,
District Judge.

Approved as to Form as Provided by Rule 5 (a):

/s/ EDWARD C. RENWICK,
Attorney for Defendant, Union Pacific Railroad
Company, a Corporation.

BROBECK, PHLEGER &
HARRISON,
Attorneys for Defendant, Dining Car Employees
Union Local 372, a Voluntary Unincorporated
Labor Organization.

Receipt of Copy Acknowledged.

Lodged January 31, 1950.

[Endorsed]: Filed February 13, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Thomas E. Hayes, Alfred Allen, Bennie Bates, Max D. Banks, Walter G. Bassett, Lewis Ballard, Clarence O. Buckner, John Bukey, Henry Burnett, Richard Burton, Willie R. Burton, Jess Clark, M. G. Clayton, Tom D. Clerkley, Raymond Corbin, Flenoid Cunningham, John H. Dale, Walter Dean, Philip Doolittle, Ted Eaton, Albert L. Ellington, Robert M. Ewing, Leroy Fisher, Waymon Fleming, Freddie Franks, Langston Gardner, Junior N. Gilbreath, Dennis Hall, Elbert J. Holliday, Horace Gipson, Thomas Jackson, Robert L. Ivory, Marion L. Johns, Charles Johnson, Donald W. Johnson, Edward M. Jones, Theodore R. Jones, Henry O. Jury, Albert J. Kennedy, Edmond King, Jr., L. A. King, Raasneth Kirk, Emmett L. Lark, Robert Lilliard, John H. Lofton, Hurdo Lee Longmire, Joel Manning, Osceola Manning, Frederick J. May, Hayward D. Maynor, Walter M. Moore, John W. Morgan, Richard O. Morrison, Belford N. Moses, Leonard A. Nelson, Lawrence Nolbert, Oliver E. Odom, Charles N. Pankey, Jr., Douglas Redden, Charles M. Renfro, Leonard Rivers, Isaiah Rivers, Bennie Robinson, Harvey H. Robinson, Frank Sanders, Junior; John J. Shanks, John A. Shaw, Albert Smith, Charles R. Smith, French L. Spencer, Thomas R. Spikes, Vernon Stamps, Amos Stoner, Willie M. Swanson, Konwood Thomas, Harvey H. Trammels, Robert

C. Turner, Frank Valentine, Livingston S. Vaughn, Roscoe J. Vaughn, Jr., Jarome O. Watson, Henry D. Wiley, J. M. Williams, Henry L. Williamson, Charles Winston, Elie Woods, Jr., Pall E. Woods, and Charles P. Westbrooke, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit, from the order made and entered herein on the 19th day of January, 1950, dismissing the complaint herein for lack of jurisdiction, and from the order made and entered herein on the 13th day of February, 1950, denying appellants' motion to set aside the said order of dismissal of January 19, 1950, and to permit the filing of an amended complaint, and from the final judgment of dismissal made and entered herein on the 13th day of February, 1950.

Dated: February 16, 1950.

GLADSTEIN, ANDERSEN,
RESNER & SAWYER,

By /s/ HAROLD M. SAWYER,
Attorneys for Plaintiffs and
Appellants.

[Endorsed]: Filed February 17, 1950.

In the Southern Division of the United States
District Court for the Northern District of
California. .

No. 28990-R

THOMAS E. HAYES, on Behalf of Himself and
All Others Similarly Situated Who May Come
in and Prosecute This Action and Contribute
to the Costs Thereof,

Plaintiff,

vs.

UNION PACIFIC RAILROAD CO., a Corpora-
tion, and DINING CAR EMPLOYEES UN-
ION LOCAL 372, a Voluntary Unincorpo-
rated Labor Organization, JAMES G. BARK-
DOLL, as District Director of Said Local 372
in the District of Los Angeles, State of Cali-
fornia,

Defendants.

Argument

October 24 and 25, 1949

Before: Hon. Michael J. Roche,
Judge.

REPORTER'S TRANSCRIPT

Appearances:

For the Plaintiff

HAROLD M. SAWYER, ESQ.

For the Defendant Local 372

MARION B. PLANT, ESQ.,
SAMUEL L. HOLMES, ESQ.

For the Defendant Union Pacific

EDWARD C. RENWICK, ESQ.,
JAMES A. WILCOX, ESQ.

* * *

Mr. Sawyer: May it please the court, there have been several arguments advanced, some material, some rather trivial, but I would like to address myself first to the subject of jurisdiction, because if this court has no jurisdiction that is the end of it.

I will say in the first instance that the cause of action which we attempted to plead is based exclusively upon the authority of the Steele and Tunstall cases, both decided in 1944, and there is no later case dealing with this issue. The Steele case was started against the Louisville & Nashville Railroad, and the Tunstall case was against a railroad and the Brotherhood of Locomotive Engineers. In fact, the brotherhood was joined in both cases. Now, the facts out of which those two cases arose are exceedingly significant. If we do not bring ourselves within the principle of the Steele and the Tunstall cases I am quite prepared to admit that we have no authority behind us.

* * *

Mr. Sawyer: Will you pardon me a minute? Alabama. The Supreme Court issued certiorari to

the Supreme Court of the state. The Tunstall case arose in a Virginia District Court. It was dismissed by the trial court, district court, for lack of jurisdiction. That holding was examined by the Circuit Court of Appeals for the Fourth Circuit and again the Supreme Court issued certiorari to the Circuit Court of Appeals. The decision in both cases is the same. Both cases arise out of the same set of facts.

In the Steele case suit was brought by a locomotive fireman against his employer, Louisville & Nashville Railroad Co., the Brotherhood of Locomotive Firemen & Engineers, and certain individuals representing the brotherhood. "The petitioner, who was a negro, was a locomotive fireman in the employ of the respondent railway, suing on his own behalf and that of his fellow employees, who, like petitioner, are negro firemen employed by the railroad. Respondent brotherhood was a labor organization and the exclusive bargaining representative of the craft of firemen employed by the railroad and recognized by it as such and the members of the craft. The majority of the firemen employed by the railroad are white and are members of the brotherhood, but a substantial minority are negroes who, by the constitution and ritual of the brotherhood, are excluded from its membership."

May I pause there to point out that in the Hayes case, the case at bar, there is no exclusion of negroes from the union, but that distinction is not decisive.

Mr. Sawyer: Let me explain it. The practice has been—then I will say the changes only came through the pressures which led to this lawsuit. The practice has been uniformly to employ all negroes, at the time they are initially employed in group B, in class 3 or 4, whereas at the same time of initial employment the practice has been to employ all whites in group A and in classes 1 and 2. Now look at the consequences of that. In the first place, this collective bargaining agreement shows how you get an employment relation, and you get it by performing service in any group or class for 90 days continuously, and your seniority date is the date that you first went to work. With the negroes all employed in group B and the whites all employed in group A, the seniority problems presented by this discrimination are almost insuperable. Here is the way, under the agreement, you gain seniority in any higher group or class. Rule 22:

“All new positions or vacancies shall be promptly bulletined on bulletin boards in all terminals affected. Positions of 30 days or less duration shall be considered temporary——”

Mr. Renwick said today there was no violation because we didn't accumulate seniority while filling temporary positions. There is no issue there at all. We agree.

“——and may be filled without bulletining. Positions of indefinite duration and/or known to be more than 30 days shall be bulletined, as temporary positions and again bulletined as soon as known to

be permanent," so there is no quarrel about the failure to accumulate seniority on temporary positions unless an accumulation of temporary positions is a device for tying up accumulation of seniority.

The Court: Is there any thought that there is?

Mr. Sawyer: Is there any thought of that?

The Court: Yes.

Mr. Sawyer: I can't tell you. It has been suggested, but discrimination takes so many forms.

The Court: That is the reason I make the inquiry, so that I will follow it.

Mr. Sawyer: Yes, I am glad you do.

All right, let's take a negro who has been employed and given seniority date in class B. There comes along a vacancy or a new position at a higher group, class A. He can bid on it, but he can't get a job in competition with a white man who has already accumulated more seniority than the negro has in the group in which the bulletined position is.

The Court: That is as it should be, is it not?

Mr. Sawyer: I don't think so.

The Court: Why?

Mr. Sawyer: Because that inability is a limitation imposed on the negro because of the discriminatory policy of assigning him to class B at the initial hiring and the white man in class A.

The Court: You indicated also he had seniority, the white man.

Mr. Sawyer: Because the reason for it is, suppose the white man and the negro were hired the same day——

The Court: Yes.

Mr. Sawyer: —and the negro worked a year and the white man worked a year, then the negro wants to bid on a group A position, he can't defeat the white man who has got group A seniority of a year.

The Court: Why?

Mr. Sawyer: Because the white man was a member of the group A at the first, and the negro was employed in group B. It is that initial discrimination that is the key to this whole case.

* * *

The Court: Is this Stone speaking?

Mr. Renwick: Yes, your Honor. And certain cases are cited.

“Without attempting to mark the allowable limits of differences in terms of contracts based on differences of conditions to which they apply, it is enough for present purposes to say that the statutory power to represent a craft and to make contracts as to wages, hours and working conditions does not include the authority to make among members of the craft discriminations not based on such relevant differences. Here the discriminations based on race alone are obviously irrelevant and invidious.”

That was the narrow holding of this case, but a difference in seniority based solely upon race was prohibited, not that there could not be differences in seniority, providing an agreement which treated different members of a class differently.

Mr. Sawyer: I have never disputed that.

The Court: What is that?

Mr. Sawyer: I have never disputed that. I only urge the distinction could not be based solely on race.

Mr. Renwick: I am pointing out that without discrimination there isn't anything in this case upon which the court's jurisdiction can be based.

The Court: Counsel concedes that.

Mr. Sawyer: I certainly do.

* * *

CERTIFICATE OF REPORTER

I, Kenneth J. Peck, Official Reporter, certify that the foregoing pages are a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting to the best of my ability.

/s/ KENNETH J. PECK.

[Endorsed]: Filed December 29, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents, listed below, are the originals filed in this Court, or a true and correct copy of an order entered on the minutes of this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the parties, to wit:

Complaint to Prevent, and Secure Damages for, Unlawful Discrimination Under the Railway Labor Act.

Affidavit of H. A. Hansen.

Affidavit of Steven R. Auguston.

Motions to Dismiss, to Strike, to Sever Claims and for a Definitive Statement.

Motions to Dismiss for More Definite Statement and to Strike.

Affidavit of H. I. Norris.

Affidavit of Thomas E. Hayes, One of Plaintiffs Herein, in Opposition to the Motions of Defendant, Union Pacific Railroad and Defendant Dining Car Employees' Union, Local 372.

Affidavit of H. A. Hansen, Addressed to the 15-page Affidavit of Thomas E. Hayes, Verified on October 15, 1949—Exhibits attached.

Affidavit of H. A. Hansen.

Affidavit of Thomas E. Hayes Addressed to the Nine-Page Affidavit of H. A. Hansen, Verified October 21, 1949.

Affidavit of J. Hansink.

Affidavit of H. A. Hansen Addressed to the 7-page Affidavit of Thomas E. Hayes Verified on October 21, 1949—Exhibits attached.

Opinion.

Notice of Motion for Leave to File an Amended Complaint and Amended Complaint to Prevent, and Secure Damages for, Unlawful Discrimination Under the Railway Labor Act Verified by Thomas E. Hayes, January 25, 1950.

Amended Notice of Motion to Set Aside Order of Dismissal and for Leave to File an Amended Complaint.

Minute Order of February 13, 1950—Order Denying Motion to Set Aside Judgment of Dismissal, and for Leave to File Amended Complaint.

Judgment of Dismissal.

Notice of Appeal.

Designation of the Portions of the Record and Proceedings to Be Contained in the Record on Appeal and Statement of Points to Be Relied Upon on Appeal by Appellants.

Designation by Appellee Union Pacific Railroad Company of Additional Portions of Record and Proceedings to Be Included in the Record on Appeal.

Counter Designation of Record by Dining Car Employees' Union, Local 372.

Reporter's Transcript for October 24 and 25, 1949—Argument.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 23rd day of March, A.D. 1950.

C. W. CALBREATH,
Clerk.

[Seal]: By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12509. United States Court of Appeals for the Ninth Circuit. Thomas E. Hayes, on behalf of himself and all others similarly situated, Appellants, vs. Union Pacific Railroad Co., a Corporation, and Dining Car Employees Union Local 372, a voluntary unincorporated labor organization; James G. Barkdoll, as District Director of said Local 372 in the District of Los Angeles, State of California, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed March 23, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

Case No. 12,509

THOMAS E. HAYES, et al.,

Appellants,

vs.

UNION PACIFIC RAILROAD COMPANY, etc.,
et al.,

Appellees.

STATEMENT OF POINTS UPON WHICH
APPELLANTS INTEND TO RELY

The points upon which appellants intend to rely on this appeal are:

1. The original complaint filed herein on July 6, 1949, stated a cause of action within the jurisdiction of the court below, and that court should not have dismissed the same for lack of jurisdiction.

2. The proposed amended complaint, verified by Thomas E. Hayes January 25, 1950, states in two counts a cause of action within the jurisdiction of the court below, and that court should have permitted appellants to file the same.

3. The court below should not have refused to

set aside and vacate its order of dismissal for lack of jurisdiction.

Dated: March 28, 1950.

GLADSTEIN, ANDERSEN,
RESNER & SAWYER,

By /s/ HAROLD M. SAWYER,
Attorneys for Appellants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 28, 1950.

[Title of Court of Appeals and Cause.]

DESIGNATION OF ALL OF THE RECORD
WHICH IS MATERIAL TO THIS APPEAL

To the Clerk of the Above-Entitled Court:

Appellants hereby designate all of the record which is material to the consideration of this appeal:

1. Complaint filed herein July 6, 1949, omitting interrogatories attached thereto.
2. Motion of defendant Union Pacific Railroad Company to dismiss, for more definite statement, and to strike, dated September 9, 1949.
3. Motion of defendant Dining Car Employees Union Local 372 to dismiss, to strike, to sever claims, and for more definite statement, undated.
4. Opinion of the District Court and order of

dismissal of complaint for lack of jurisdiction, filed January 19, 1950.

5. Amended Notice of Motion to set aside dismissal order of January 19, 1950, and to permit filing of amended complaint, filed herein February 2, 1950.

6. Amended complaint verified by Thomas E. Hayes January 25, 1950.

7. Order of the District Court made and entered February 13, 1950, denying motion to set aside dismissal order of January 19, 1950, and to file amended complaint.

8. Judgment of dismissal made and entered herein February 13, 1950.

Dated: March 28, 1950.

GLADSTEIN, ANDERSEN,
RESNER & SAWYER,

By /s/ HAROLD M. SAWYER,
Attorneys for Appellants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 28, 1950.

[Title of Court of Appeals and Cause.]

DESIGNATION BY APPELLEE UNION PACIFIC RAILROAD COMPANY OF ADDITIONAL PARTS OF THE RECORD TO BE PRINTED.

To the Clerk of the Above-Entitled Court:

The Appellee Union Pacific Railroad Company hereby designates the following parts of the record to be printed, in addition to those heretofore designated by Appellants, which are material to the consideration of the Appeal:

1. Affidavit of H. A. Hansen notarized August 26, 1949, filed August 29, 1949;
2. Affidavit of Steven R. Auguston notarized September 14, 1949, filed September 14, 1949;
3. Affidavit of H. I. Norris notarized September 10th, 1949, filed September 15, 1949;
4. Affidavit of Thomas E. Hayes notarized October 15th, 1949, filed October 19, 1949;
5. Affidavit of H. A. Hansen notarized October 21, 1949, filed October 24, 1949;
6. Affidavit of Thomas E. Hayes notarized October 31st, 1949, filed November 7, 1949;
7. Affidavit of J. Hansink notarized November 11, 1949, filed November 15, 1949;
8. Affidavit of H. A. Hansen notarized November 12, 1949, filed November 15, 1949;

9. The following portions of the Reporter's Transcript of the hearing before District Judge Michael J. Roche October 24th and 25th, 1949:

- a. Lines 6-22, inclusive, page 50;
- b. Line 3, page 51, to line 4, page 52, inclusive;
- c. Line 12, page 72, to line 1, page 75, inclusive;
- d. Line 20, page 99, to line 21, page 100, inclusive.

Dated: April 4, 1950.

T. W. BOCKES,
W. R. ROUSE,
ELMER COLLINS,
JAMES A. WILCOX,
E. E. BENNETT,
EDWARD C. RENWICK,
MALCOLM DAVIS,
W. J. SCHALL,

By /s/ EDWARD C. RENWICK,
Attorneys for Appellee, Union Pacific Railroad
Company.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 5, 1950.

[Title of Court of Appeals and Cause.]

DESIGNATION BY APPELLEE DINING CAR
EMPLOYEES UNION, ETC., OF ADDI-
TIONAL PARTS OF THE RECORD

To the Clerk of the Above-Entitled Court:

The Appellee Dining Car Employees Union, etc., hereby designates the following parts of the record, in addition to those heretofore designated by Appellants, which are material to the consideration of the Appeal:

1. Affidavit of H. A. Hansen filed August 29, 1949;
2. Affidavit of Steven R. Auguston filed September 14, 1949;
3. Affidavit of H. I. Norris notarized September 10, 1949, and filed September 15, 1949;
4. Affidavit of Thomas E. Hayes filed October 19, 1949;
5. Affidavit of H. A. Hansen filed October 24, 1949;
6. Affidavit of Thomas E. Hayes filed November 7, 1949;
7. Affidavit of J. Hansink filed November 15, 1949;
8. Affidavit of H. A. Hansen filed November 15, 1949.

9. The following portions of the Reporter's Transcript of the hearing before District Judge Michael J. Roche, October 24 and 25, 1949;

- a. Lines 6-22, inclusive, page 50;
- b. Lines 2-4, inclusive, page 52;
- c. Line 12, page 72, to line 1, page 75.

Dated: April 5th, 1950.

BROBECK, PHLEGER &
HARRISON,

/s/ MARION B. PLANT,
Attorneys for Dining Car
Employees Union, etc.

Affidavit of Service by Mail attached.

Receipt of copy acknowledged.

[Endorsed]: Filed April 6, 1950.

No. 12,509

IN THE
United States Court of Appeals
For the Ninth Circuit

THOMAS E. HAYES, et al., on Behalf of
Himself and All Others Similarly
Situating,

Appellants,

vs.

UNION PACIFIC RAILROAD Co. (a corpo-
ration) and DINING CAR EMPLOYEES
UNION LOCAL 372 (a voluntary un-
incorporated labor organization);
and JAMES G. BARKDOLL, as District
Director of said Local 372 in the
District of Los Angeles, State of
California,

Appellees.

BRIEF FOR APPELLANTS.

HAROLD M. SAWYER,

240 Montgomery Street, San Francisco 4, California,

Solicitor for Appellants.

ARCHIBALD BROMSEN,

450 Seventh Avenue, New York 1, New York,

GLADSTEIN, ANDERSEN, RESNER & LEONARD,

240 Montgomery Street, San Francisco 4, California,

Of Counsel.

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Table of Authorities Cited

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No. 12,509

IN THE

**United States Court of Appeals
For the Ninth Circuit**

THOMAS E. HAYES, et al., on Behalf of
Himself and All Others Similarly
Situated,

Appellants,

vs.

UNION PACIFIC RAILROAD Co. (a corpo-
ration) and DINING CAR EMPLOYEES
UNION LOCAL 372 (a voluntary un-
incorporated labor organization);
and JAMES G. BARKDOLL, as District
Director of said Local 372 in the
District of Los Angeles, State of
California,

Appellees.

BRIEF FOR APPELLANTS.

JURISDICTIONAL STATEMENT.

This is an appeal from an order of dismissal upon the sole ground of lack of jurisdiction made and entered by the Court below on January 19, 1950 (Tr. 136-144, incl.), from a minute order made and entered herein on February 13, 1950, denying the motion to set aside judgment of dismissal and for leave to file

amended complaint (Tr. 163), and from judgment of dismissal made and entered herein on February 13, 1950 (Tr. 164, 165), in a civil suit instituted by appellants against appellee Union Pacific Railroad Co., a corporation (hereinafter referred to as "Railroad"), appellee Dining Car Employees Union Local 372, a voluntary unincorporated labor organization (hereinafter referred to as "Union"), and appellee James G. Barkdoll as District Director of said Local 372 in the District of Los Angeles, State of California, seeking a declaratory judgment that the discriminatory practices set forth in the complaint are illegal and a violation by Union of its responsibilities as sole collective bargaining agent for appellants herein, and by Railroad of its obligation not to benefit by any discriminatory practices against appellants by reason of race or color, acquiesced in or perpetuated by Union; for an order according appellants and each of them such seniority dates in such class or classes or group or groups as they would have been entitled to had there been no discrimination against them by Union and Railroad; for an injunction forever restraining Railroad and Union from engaging in discrimination in the application of seniority rules to appellants, and for damages both compensatory and exemplary, and costs of suit and disbursements, including allowance of a reasonable attorneys' fee.

Jurisdiction of this Court is conferred by 28 U.S.C. § 1291. (Appendix p. i.)

The jurisdiction of the District Court and of this Court are pleaded in paragraph III of the complaint

(Tr. 3) to the effect that jurisdiction is conferred on the District Court by 28 U.S.C. § 1337 (Judicial Code), giving the District Court original jurisdiction of any civil action arising under any act of Congress regulating commerce (Appendix p. i), and by Section 2 of the Railway Labor Act, 45 U.S.C. § 152. (Appendix pp. i-vii.)

STATEMENT OF THE CASE.

The parties to this appeal occupy the same relative positions as they did in the Court below, and hereafter appellants will be referred to as plaintiffs, and appellees as defendants.

The allegations of the complaint may be briefly summarized as follows, but reference should be made to the text of the complaint for better understanding (Tr. 2-17, incl.):

Thomas E. Hayes brought the action on behalf of himself and on behalf of certain persons whose names are set forth in Exhibit A attached to the complaint, all of whom were thereafter collectively referred to as plaintiffs (Complt. I, Tr. 3), and all of whom are members of the Negro race in the employ of defendant Railroad as cooks in the Dining Car Department thereof. (Complt. VI, Tr. 4.)

The statutory basis for jurisdiction of the District Court was alleged (Complt. III, Tr. 3), and defendant Railroad was described as a foreign corporation engaged in interstate commerce and admitted to do business in the State of California; and defendant Dining

Car Employees Local 372 was characterized as a voluntary unincorporated association and labor organization acting as exclusive bargaining agent pursuant to the terms of the Railway Labor Act for plaintiffs and all other employees of Railroad engaged in dining car and commissary service and functioning as such collective bargaining agent in the State of California and within the jurisdiction of the Court. (Complt. IV, Tr. 3-4.)

The members of defendant Union are numerous and are brought before the Court by service upon defendant James G. Barkdoll, District Director for Union of the Los Angeles, California, District. (Complt. V, Tr. 4.)

There was in force at all the times mentioned in the complaint a written collective bargaining agreement executed by Railroad and Union, effective June 1, 1942. (Complt. VII, Tr. 5.)

All of the plaintiffs were in the employ of defendant Railroad when the suit was brought. (Complt. VIII, Tr. 5.) At the time when they were first employed they were, solely because they were Negroes, assigned by Railroad, with the connivance of Union, seniority dates in Group B as defined in Part I, Article IV, Rule 19, of said agreement, and also seniority dates in Class 3 or 4 as second cooks and coach buffet cooks as defined in Part I, Article IV, Rule 20, of said agreement; whereas, white persons when first employed, and solely because they were white, were similarly assigned seniority dates in Group A—standard dining car runs, as defined in

said Rule 19, and in Class 1—chef caterers, or Class 2—chefs, as defined in said Rule 20; and by reason of the discriminatory treatment given to said white employees, their pay and allowances were materially larger than those of plaintiffs, although there was no distinction between the ability and competence of plaintiffs and the white employees. (Complt. IX, Tr. 5, 6.)

Under the terms of said agreement, and particularly Part I, Article IV, Rule 17(c) thereof, it was impossible for plaintiffs to obtain a seniority date and accumulate seniority in a higher class than that to which they were assigned at the inception of their employment relationship, except in accordance with the terms of said Rule 17, which provides that an employee will be accorded a seniority date in a higher group or class in which he has not previously acquired a seniority date only upon assignment by bulletin to a bulletined position or vacancy in such higher group or class and the seniority date so accorded will be the date of assignment and will also be accorded in all intermediate groups and classes, and an employee assigned to a position in a higher group or class will retain the seniority dates held in all lower groups and classes and continue to accumulate seniority therein. Defendant Railroad, in connivance with defendant Union, has at all times within four years preceding the filing of the complaint herein refused to permit plaintiffs to acquire seniority either in Class 1—chef caterers, or Class 2—chefs, as defined in Part I, Article IV, Rule 20, or in Group A—standard dining car runs, as defined in Part I, Article IV, Rule 19, by

refusing to accept from plaintiffs bids for bulletined positions in higher groups and classifications to which they were entitled by reason of seniority, and which bulletined positions were filled, by defendant Railroad in connivance with defendant Union, by white members of defendant Union having lesser seniority than plaintiffs. (Complt. X, Tr. 6, 7.) This allegation is dropped from the first cause of action set forth in the amended complaint for reasons hereinafter stated.

Said agreement provided in Part I, Article V, Rule 26 thereof that promotion shall be based upon seniority, fitness and ability, fitness and ability being sufficient, seniority shall prevail; but with reference to these plaintiffs, defendant Railroad, in connivance with defendant Union, has denied plaintiffs seniority in higher classes and groups while at the same time has employed plaintiffs in such higher classes and groups for long periods of time without any criticism of their fitness and ability, and the reason for the said discrimination against plaintiffs was and is because they are Negroes, and it is and has been the purpose of defendant Railroad and defendant Union to drive plaintiffs and all other Negroes from service in the employment of defendant Railroad in its dining car department, except in inferior groups and classes, and that this policy was devised and has been enforced with express malice against plaintiffs and for the purpose of oppressing them. (Complt. XII, Tr. 8.)

Defendant Union is controlled entirely by persons wholly in sympathy with the said policy of discrimi-

nation and, notwithstanding repeated protests by plaintiffs and their representatives, defendants Railroad and Union have failed, neglected and refused to refrain from said discriminatory practices. And because all higher administrative bodies to which plaintiffs might take their case are composed of the very people who have perpetuated these discriminatory practices, plaintiffs have no administrative remedy and can obtain no relief except in equity. (Complt. XIII, Tr. 8, 9.)

All the employment records of plaintiffs are in the exclusive possession of defendant Railroad and hence plaintiffs cannot, without access to these records, establish the damages they have suffered within the four years immediately preceding the filing of the complaint. (Complt. XIV, Tr. 9.)

Motions to dismiss were interposed by defendant Union (Tr. 32-37, incl.), and by defendant Railroad (Tr. 38-41, incl.).

Before the hearing on the motions to dismiss took place, several affidavits and counter-affidavits were filed by plaintiffs and defendants raising various issues, none of which was passed upon by the Court below because the order of dismissal was made solely on the ground that the Court had no jurisdiction. We quote from the opinion of the Court below:

“The question of jurisdiction being decisive, it is not necessary to consider the other motions and respondents’ motion to dismiss the action must be granted”. (Tr. 143, 144.)

At the hearing on the motions to dismiss, counsel for plaintiffs grounded their right of action upon two cases in the Supreme Court of the United States:

Steele v. Louisville & Nashville RR Co., et al.,
323 U.S. 192, 89 L.Ed. 173; and

*Tunstall v. Brotherhood of Locomotive Firemen
& Enginemen*, 323 U.S. 210, 89 L.Ed. 187;

in both of which cases there was an express, written contract between defendant union, which was the sole collective bargaining agent involved, and defendant railroad, which was the employer, providing in express terms for discriminatory treatment of Negro firemen. (Op'n Tr. 136, at 139.) The District Court, however, held that because there was no discriminatory contract here, but merely a discriminatory practice indulged in by defendant Railroad, with the connivance of defendant Union, there was no jurisdiction because defendant Union had not, as was the situation in the *Steele* and *Tunstall* cases, *supra*, by direct contract, engaged in any discrimination against plaintiffs in violation of its duty and obligation as sole collective bargaining agent.

At the hearing counsel for plaintiffs specifically requested the Court, if its decision on the motions was adverse to plaintiffs, for an opportunity to amend the complaint so as to present the strongest record for presentation to the Court of Appeals, and the Court assured counsel that he would have every facility for the making of the best record which the facts would permit.

Thereafter, counsel for plaintiffs made a motion for leave to file an amended complaint (Tr. 144), to which was attached a copy of the proposed amended complaint verified by Thomas E. Hayes on January 25, 1950, and the motion was amended to make it a motion to set aside the order of dismissal and for leave to file an amended complaint. (Tr. 161, 162.)

On February 13, 1950, the Court made a minute order denying the motion to set aside the dismissal and for leave to file an amended complaint (Tr. 163), which was followed by the entry of a judgment of dismissal on the same day. (Tr. 164, 165.)

It will be noted that the judgment of dismissal purports not only to rule on the question of lack of jurisdiction, but also upon other matters presented by the defendants. But the fact is, as indicated by the Court's opinion (Tr. 136, at 143, 144), to which the Court adhered, that the dismissal was based solely upon a lack of jurisdiction. This was proven by the remark of the Court in that opinion that the question of jurisdiction was decisive. (Op'n Tr. 143, 144.) Because the order went further than the Court's decision, counsel for plaintiffs refused to endorse thereon his approval as to form.

The amended complaint had a dual purpose. It was designed to present the strongest possible pleading consistent with the facts. The substance of the original complaint was realleged as a first cause of action, with some changes necessitated by knowledge gained by counsel subsequent to the filing of the original com-

plaint. The primary change made in the first cause of action of the amended complaint was the omission therefrom of the last sentence of paragraph X of the original complaint (Complt. X, Tr. 7), and the addition to the paragraph of the following language:

“By reason of the above-described discrimination against Negroes practiced by Railroad, in connivance with Union, plaintiffs have, since their initial employment by Railroad, been unable to build up seniority in seniority groups and classes higher than those in which they were originally given seniority dates, and hence never, as long as they remain in Railroad’s employ, will be able to exercise seniority rights in higher groups and classes in competition with white employees.” (Am. Complt. X, Tr. 152.)

The original complaint, in said paragraph X (Tr. 6, 7), charged that defendant Railroad refused to permit the plaintiffs to exercise their seniority by declining to accept their bids on bulletined jobs in higher groups and classes than those in which they were originally employed. It developed that several at least of the plaintiffs had at long last and after years of service been finally accorded seniority dates in higher groups and classes. Therefore, the charge that they had been denied the right to exercise their seniority was omitted from the first cause of action of the amended complaint.

The second cause of action set forth in the amended complaint was designed to meet the Court’s position that the collective bargaining agent, defendant Union, had not violated its duties as such by entering into a

written contract with defendant Railroad discriminatory against plaintiffs in express terms.

It has always been the opinion of counsel that the decision of the District Court was wrong, and that the original complaint stated facts bringing the case within the jurisdiction of the District Court. But, out of abundant caution, plaintiffs attempted to bring the case within the Court's ruling by charging that there was contractual action on the part of the collective bargaining agent, defendant Union, in violation of its duties as such.

The second cause of action follows very closely the pattern of the first cause of action, with this important distinction:

It alleges the same discrimination against Negroes at the time they were initially employed by defendant Railroad by assigning to them, arbitrarily, seniority dates in lower groups and classes than those automatically assigned to white cooks when they were first employed. (Am. Compl. Second Cause of Action II, Tr. 154, 155.)

Then it is alleged that the existing agreement, that is, the collective bargaining agreement of June 1, 1942, did not provide any standard or yardstick by which it could be determined in which of the several groups and classes new employees should be given seniority dates, but that the agreement was negotiated in the light of the existing discriminatory practices, and that during the said negotiations and after the effective date of the agreement, defendants Railroad and Union adopted, by verbal agreement and understand-

ing, as the method of determining seniority dates in the several groups and classes, the existing discriminatory practices and so perpetuated the same against the Negro employees of defendant Railroad, including plaintiffs. And that, as thus modified, the entire contract was, and has been ever since its effective date, and now is, discriminatory against Negroes in the employ of defendant Railroad and its dining car department. (Am. Compl. Second Cause of Action II, Tr. 155, 156.)

In other words, the distinction between the original complaint and the amended complaint is, first, that there is eliminated from the first cause of action in the amended complaint the charge that the Negro plaintiffs were not permitted to exercise their seniority rights in the higher groups and classes; and, second, in the second cause of action, that the discrimination complained of was perpetuated by agreement between defendants Railroad and Union to recognize the existing discriminatory practices as the yardstick or rule by which seniority dates in groups and classes would be assigned when men were first employed. That is, that Negroes should automatically and regardless of any consideration other than their race, be assigned seniority dates in lower groups and classes than those in which white employees, when first employed, received seniority dates.

The gist of the discriminatory practice is that, no matter how long a Negro employee remains in the service of defendant Railroad he never, under any circumstances, can build up seniority in higher groups

and classes against white persons already employed in these higher groups and classes. So that the initial discrimination against the Negro at the time of his employment, and made solely because he is a Negro, follows him to his detriment as long as he remains in railroad service.

QUESTIONS INVOLVED.

I.

Has a labor organization power under the Railway Labor Act to make a collective bargaining contract with a railroad, which contract was negotiated in the light of, and perpetuated, a discriminatory employment practice, solely because of race, against Negro employees represented by it?

II.

Has such a labor organization power, under the Act, to perpetuate, through the means of a collective bargaining agreement, an employment practice by the railroad which discriminates against the Negro employees represented by it, solely because of race?

III.

Has such a labor organization power under the Act to make a collective bargaining agreement which it knows will be applied and interpreted by the railroad to discriminate against Negro employees represented by such labor organization, solely because of race, and which was designed to perpetuate such discrimination?

SPECIFICATION OF ERRORS.

1. The Court erred in dismissing the original complaint on the ground of lack of jurisdiction in the Court to hear and determine the issues pleaded in the complaint.

2. The Court erred in holding that an express contract between Union and Railroad calling for discriminatory practices against the appellants, solely because they are Negroes, was necessary to establish jurisdiction.

3. The Court erred in holding that the discriminatory practices against appellants, solely because they are Negroes, established by Railroad and concurred in by Union, were not sufficient to give the Court jurisdiction.

4. The Court erred in holding that, unless Union actually contracted with Railroad for the application by Railroad of discriminatory practices against appellants solely because they are Negroes, Union did not violate any of its duties to appellants as their sole collective bargaining agent.

5. The Court erred in failing to set aside its order of dismissal, dated January 19, 1950, and permit the filing of the amended complaint.

SUMMARY OF ARGUMENT.

1. The power of Union to act as exclusive bargaining representative of appellants is derived from the Railway Labor Act, and the fair interpretation of the statutory language is, that the organization chosen to represent a craft is to represent all its members, the majority as well as the minority, and it is to act for and not against those whom it represents.

Steele v. Louisville & Nashville R.R. Co., et al.,
323 U.S. 192, 89 L. Ed. 173.

2. Discriminations based on race alone are obviously irrelevant and invidious, and Congress plainly did not undertake to authorize the bargaining representative to make such discriminations.

Steele v. Louisville & Nashville R.R. Co., et al.,
supra.

3. Discrimination is pleaded in this case in that Union, in effect, agreed with Railroad that Negroes, solely because they were Negroes, should when initially employed be given seniority dates in lower seniority groups and classes than those in which white cooks, when initially employed, were given seniority dates.

Steele v. Louisville & Nashville R.R. Co., et al.,
supra.

4. The collective bargaining process extends far beyond the mere negotiation and execution of a formal written document between Union and Railroad, and includes every device, subterfuge and express or implied agreement or recognition of an existing prac-

tice which results in discrimination purely on racial grounds against any members of the craft represented by Union.

Steele v. Louisville & Nashville R.R. Co., et al., supra;

Graham v. Brotherhood of L. F. & E., 94 L. Ed. Adv. Op. 1 (October Term, 1949).

5. The representative which thus discriminates may be enjoined from so doing and its members may be enjoined from taking the benefit of such discriminatory action. No more is the Railroad bound by or entitled to take the benefit of a contract, express or implied, which the bargaining representative is prohibited from making.

Steele v. Louisville & Nashville R.R. Co., et al., supra.

6. The original complaint disclosed a case of racial discrimination by joint action of Railroad and Union which was within the jurisdiction of the District Court.

Steele v. Louisville & Nashville R.R. Co., et al., supra.

7. The amended complaint reiterates, in the first cause of action, the substance of the original complaint, and in the second cause of action sets forth distinct, contractual action on the part of Union and Railroad in the execution of a collective bargaining agreement, non-discriminatory upon its face, but which Union knew, when the same was negotiated and executed, would be interpreted in the light of the

existing discriminatory practice, to the prejudice of the Negro cook appellants in this case.

Steele v. Louisville & Nashville R.R. Co., et al., supra.

ARGUMENT.

I.

THE NATIONAL RAILWAY LABOR ACT, AS CONSTRUED BY THE SUPREME COURT, PROHIBITS THE SOLE COLLECTIVE BARGAINING AGENT, ACTING AS SUCH BY VIRTUE OF THE ACT, FROM DISCRIMINATING AGAINST ANY EMPLOYEES REPRESENTED BY IT SOLELY ON THE GROUND THAT THEY ARE NEGROES.

Under this heading and the second one, we shall discuss the first, second, third and fourth Specifications of Error.

The question involved in this case first came before the Supreme Court in the case of:

Steele v. Louisville & Nashville R. R. Co., et al.,
323 U.S. 192, 89 L.Ed. 173;

and the companion case of:

Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U.S. 210, 89 L.Ed. 187.

The facts in both cases were substantially the same. The Union, as sole collective bargaining agent for all firemen and enginemen, entered into a written contract with the Railroad which provided, in substance, for the destruction of seniority already earned by Negro firemen and their gradual elimination from railroad employment. The Negro firemen were, by the

union's constitution, denied membership in the organization; whereas, in the case at bar, Negro cooks are freely accepted as members of Union. But nothing turns on this distinction.

In the very first paragraph of the opinion of the Court in the *Steele* case, delivered by Mr. Chief Justice Stone, the Court said:

“The question is whether the Railway Labor Act imposes on a labor organization acting by authority of the statute as the exclusive bargaining representative of a craft or class of railway employees the duty to represent all the employees in the craft without discrimination because of their race and, if so, whether the courts have jurisdiction to protect the minority of the craft or class from the violation of such obligation.” (323 U.S. 193, 194; 89 L.Ed. at 178.)

The very phraseology which was used to frame the question shows that the obligation of such a labor union is to represent all the employees in the craft without discrimination because of their race.

The precise issues raised by the case at bar were not involved in either the *Steele* or the *Tunstall* cases, for in both cases there was a flagrant, arrogant and arbitrary contract calling for discrimination, in the making of which the collective bargaining agent participated. But it is submitted that the principle established in these cases is not dependent upon an express, written, formal contract between Railroad and Union, but is applicable to a situation where the discriminatory practice is the result of passive acceptance by Union of the discrimination engaged in by

Railroad, and its perpetuation grows out of the collective bargaining process.

Suppose, for example, that there had been no formal written agreement between railroad and union in the *Steele* and *Tunstall* cases discriminatory against Negro firemen purely because of their race. But, on the contrary, that the railroad had announced the self-same policy of discrimination embodied in the contract, and the union had tacitly let it be known that it would not lift a finger to protect the employees it represented but, on the contrary, would acquiesce and concur in the establishment of the discriminatory practice by the railroad. Can it be said that the decision in the *Steele* and *Tunstall* cases would, under these circumstances, have been different, and that the Negro firemen would have been left without redress because the Court had no jurisdiction?

Is not the breach of duty postulated in the opening sentence of the opinion and cast upon the collective bargaining agent by virtue of the terms of the Railway Labor Act, as gross in the one case as it is in the other?

Is not the same obligation imposed upon the collective bargaining agent in the case of an implied or tacit agreement, as well as in the case of a formal written instrument?

Can Union and Railroad accomplish by indirection that which they are prohibited from doing directly?

Is the bargaining power of the sole collective bargaining representative exhausted by the drawing up

and executing of a formal agreement with the Railroad so that, as long as the agreement is not in terms discriminatory, it may be interpreted by common consent of the parties in a manner highly discriminatory?

Further along in the opinion in the *Steele* case, we find this significant language:

“But we think that Congress in enacting the Railway Labor Act and authorizing a labor union chosen by a majority of a craft to represent the craft did not intend to confer plenary power upon the union to sacrifice for the benefit of its members rights of the minority of the craft without imposing on it any duty to protect the minority”. (323 U.S. at 199; 89 L.Ed. at 181.)

After pointing out that the purposes of the Act declared by Section 2, are the avoidance of “any interruption to commerce or to the operation of any carrier engaged therein”, and that this aim is sought to be achieved by encouraging “the prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions”, the Court said:

“These purposes would hardly be attained if a substantial minority of the craft were denied the right to have their interests considered at the conference table. And if the final result of the bargaining process were to be the sacrifice of the interests of the minority by the action of a representative chosen by the majority, the only recourse of the minority would be to strike with the attendant interruption of commerce which the Act seeks to avoid.” (323 U.S. at 200, 89 L.Ed. at 182.)

The ultimate rule established by the *Steele* and *Tunstall* cases is expressed in the following language of the Court:

“We think that the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates. Congress has seen fit to clothe the bargaining representative with powers comparable with those possessed by a legislative body, both to create and restrict the rights of those whom it represents, cf. *J. I. Case Co. v. National Labor Relations Board*, *supra* (321 U.S. 335, 88 L.Ed. 766, 64 S.Ct. 566), but it has also imposed upon the representative its corresponding duty. We hold that the language of the Act to which we have referred, read in the light of the purposes of the Act, expresses the *aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to fairly exercise the power conferred upon it on behalf of all those for whom it acts, without hostile discrimination against them.*” (323 U.S. at 202, 89 L.Ed. at 183.) (Italics supplied.)

It follows, we submit, that the collective bargaining agent is, when it makes with the Railroad a collective bargaining contract which was negotiated in the light of, and perpetuated, a discriminatory employment practice solely because of race, just as guilty of a violation of its duty as the Union was in the *Steele* and *Tunstall* cases.

No labor organization should have power under the Act to perpetuate, through the means of a collective bargaining agreement, an employment practice by Railroad which discriminates against the Negro employees solely because of race.

Nor should a collective bargaining agent, under the Act, have power to make a collective bargaining agreement which it knows will be applied and interpreted by the railroad to discriminate against Negro employees represented by such labor organization solely because of race and which was designed to perpetuate such discrimination.

If, therefore, there is discrimination in the case at bar against the appellants solely because they are Negroes, practiced by Railroad and acquiesced in by Union, and the contract actually made, though non-discriminatory on its face, is nevertheless intended by both parties to it, namely, Railroad and Union, to perpetuate through the contract an existing discriminatory employment practice, we submit that the District Court did have jurisdiction just as clearly as it did in the *Steele* and *Tunstall* cases.

II.

**THERE IS ACTUAL DISCRIMINATION AGAINST APPELLANTS,
SOLELY BECAUSE THEY ARE NEGROES, AS A RESULT OF
THE JOINT ACTION BY UNION AND RAILROAD.**

Thus far we have assumed that there was discrimination against the appellants by the joint action of Railroad and Union, and that that discrimination was

predicated exclusively upon the fact that appellants are Negroes. It now remains to examine the allegations of the pleadings and to demonstrate what the discrimination was and how it affects appellants.

It is alleged in the complaint and amended complaint (Tr. 155), that the collective bargaining agreement executed by Railroad and by Union, as collective bargaining agent for all the employees in the dining car service of Railroad, set up various seniority groups and classes, but did not, by its terms, provide any method for determining, at the inception of the employment relationship, to which group or class any particular applicant for employment should be assigned. If, in making the assignment, Railroad and Union had applied standards, for example, of fitness, ability, past experience or the lack thereof equally to appellants and white cooks alike, the contract would not, either on its face, or in practical operation, be discriminatory. There was, however, as is alleged in the complaint (Complt. IX, Tr. 5, 6), and amended complaint (Am. Complt. II, Tr. 154-157, incl.), a practice of long standing which did furnish a yardstick for determining the group or class to which new employees would be assigned when first employed. That practice was that, automatically, all white employees would be assigned to Group A and Class 1 or 2; whereas, all Negroes when first employed would be assigned to Group B and Classes 3 or 4, simply because they were Negroes. And the practice arose and was perpetuated as a result of tacit agreement between Railroad and Union.

When we say "assigned", we mean that the respective employees would be given seniority dates, from which their seniority would accumulate, in the group and class to which they were initially assigned.

Let us see how this discrimination affects the individual appellant throughout his period of railroad employment. But first it must be understood, and is so alleged in the complaint (Complt. IX, Tr. 5, 6), and amended complaint (Am. Complt. II, Tr. 155), that the emoluments of assignments in Group B and Classes 3 and 4 are materially less than the emoluments of those assigned to Group A and Classes 1 and 2.

This discrimination practiced against the Negro at the time of his first employment has serious consequences which affect him throughout the term of his railroad service, and the reason is the peculiar method by which seniority is exercised.

The collective bargaining agreement provides, and it is so alleged in the complaint and amended complaint (Tr. 6, 151, 157), that seniority in any higher group or class than that to which the employee was assigned at the time of his initial employment, can be acquired only through the process known as bulletin bid and assignment.

The contract provides that new positions and vacancies shall be bulletined—that means that the specifications of a new position or vacancy in a higher group or class will be posted on a bulletin board and, within a limited number of days, employees in lower groups and classes will be permitted to bid for the

bulletined position. If the bidding employee is considered as having sufficient fitness and ability, seniority shall prevail.

Notwithstanding the welter of affidavits filed in the case at bar and included, upon the demand of Railroad and Union, in the transcript of record, *the fact remains undisputed that every one of the appellant Negro cooks, when first employed by Railroad in its dining car service as a cook, was arbitrarily given a seniority date in Group B and in Classes 3 or 4; whereas, at the same time, white applicants for cooks' jobs were automatically assigned seniority dates in Group A and in Classes 1 or 2. Fitness and ability had nothing to do with these assignments.* No matter how skilled and experienced the Negro might be, because he was a Negro, he went into Group B and Classes 3 or 4. On the other hand, no matter how lacking in skill and experience the white applicant might be, he was automatically assigned, because he was white, to Group A and Classes 1 or 2.

Furthermore, it is alleged (Tr. 8, 153 and, by incorporation by reference, 158), and not denied in any affidavit in the transcript of record, that all of the Negro cooks had fitness and ability. They had been in the employ of the Railroad for several years, and the fact of their continued employment was in itself a sufficient demonstration of fitness and ability.

In order to see how the initial discrimination at the time of original hiring operates to the disadvantage of the Negro cooks, let us examine the practical consequences of the discrimination:

Suppose a new job is bulletined, the specifications of which are that it is a Class A run requiring employees in Group 1 or 2—chef caterer or chef. If the Negro cook bids he has absolutely no seniority in Group A or Class 1 or 2, because his seniority, determined at his initial hiring, is limited to Group B or lower, and Class 3 or 4 or lower. Hence, any white cook with initially-determined seniority dates in Group A, Class 1 or 2 is, no matter when hired, bound by the very nature of the case to have more seniority for the newly-bulletined job than the Negro applicant who has never had a chance to build up seniority in the specifications of this job. Under the contract, the new position must go to the white cook because assignment will be made on the basis of seniority.

The result is that, even though the Negro cook has years of seniority in Group B, he cannot compete with any white cook for the position, even though that white cook was employed as recently as four months prior to the posting of the bulletin for the new position.

And this handicap in exercising seniority in higher groups and classes on new bulletined jobs or vacancies will follow the Negro cook as long as he remains in the railroad service. So, if the Negro gets the new job by having his bid accepted and being assigned to the job, he is able to do so only because no white cook wants the job, and can later be displaced or "bumped" by any white cook having greater seniority in Group A.

We submit, therefore, that we have established, on the face of the pleadings, a highly discriminatory practice applicable to Negroes only, and solely because they are Negroes.

III.

THE DISTRICT COURT HAD JURISDICTION OF THIS CAUSE AND THE POWER TO RELIEVE THE APPELLANTS FROM THE CONSEQUENCES OF THE DISCRIMINATORY EMPLOYMENT PRACTICES TO WHICH THEY WERE SUBJECT AND PERMANENTLY TO ENJOIN ALL SUCH PRACTICES IN THE FUTURE.

In the *Steele* case, *supra*, the Court said:

“The representative which thus discriminates may be enjoined from so doing and its members may be enjoined from taking the benefit of such discriminatory action. No more is the Railroad bound by or entitled to take the benefit of a contract which the bargaining representative is prohibited by the statute from making. In both cases the right asserted, which is derived from the duty imposed by the statute on the bargaining representative, is a federal right implied from the statute and the policy which it has adopted. It is the federal statute which condemns as unlawful the Brotherhood’s conduct. ‘The extent and nature of the legal consequences of this condemnation, though left by the statute to judicial determination, are nevertheless to be derived from it and the federal policy which it has adopted.’

* * * *Jackson County v. United States*, 308 U.S. 343, 84 L.Ed. 313, 60 S.Ct. 285; *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173, 176, 177,

87 L.Ed. 165, 168, 169, 63 S.Ct. 172; cf. *Clearfield Trust Co. v. United States*, 318 U.S. 363, 87 L.Ed. 838, 63 S.Ct. 573.

“So long as a labor union assumes to act as the statutory representative of a craft it cannot rightfully refuse to perform the duty which is inseparable from the power of representation which is conferred upon it, to represent the entire membership of the craft. While the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership, it does require the union, in collective bargaining and in making contracts with the carrier, to represent nonunion or minority union members of the craft without hostile discrimination, fairly, impartially and in good faith. Wherever necessary to that end, the union is required to consider requests of nonunion members of the craft and expressions of their views with respect to collective bargaining with the employer and to give to them notice of and opportunity for hearing upon its proposed action.” (323 U.S. 203, 204, 89 L.Ed. at 184.)

In connection with the last sentence quoted above, it is significant that it is alleged that Union is controlled by persons wholly in sympathy with the said policy of discrimination against plaintiffs and, notwithstanding repeated protests by appellants and their representatives, Railroad and Union have failed, neglected and refused to refrain from such discriminatory practices. (Complt. XIII, Tr. 8; Am. Complt.: First Cause of Action XIII, Tr. 153; Second Cause of Action III, incorporated by reference, Tr. 154.)

The truth of the matter is that the discriminatory practices complained of cannot exist except for the tacit or implied agreement between Railroad and Union that it shall exist. The purpose of the discrimination is equally clear. It is the same purpose found in the *Steele* and *Tunstall* cases, *supra*—the desire to drive Negroes out of railroad employment or relegate them to inferior jobs—a purpose which this Court cannot sanction.

The principle involved is admirably expressed by the late Mr. Justice Murphy in his concurring opinion in the *Steele* case, and we quote:

“The Constitution voices its disapproval whenever economic discrimination is applied under authority of law against any race, creed or color. A sound democracy cannot allow such discrimination to go unchallenged. Racism is far too virulent today to permit the slightest refusal, in the light of a Constitution that abhors it, to expose and condemn it wherever it appears in the course of a statutory interpretation.” (323 U.S. at 209, 89 L.Ed. at 187.)

IV.

THE DISTRICT COURT SHOULD HAVE VACATED ITS ORDER OF DISMISSAL OF JANUARY 19, 1950, AND PERMITTED THE FILING OF THE PROPOSED AMENDED COMPLAINT.

Under this heading we shall discuss the fifth Specification of Error.

The District Court's opinion (Tr. 136) to the effect that the case at bar is distinguishable from the *Steele*

(323 U.S. 192, 89 L.Ed. 173) and *Tunstall* (323 U.S. 210, 89 L.Ed. 187) cases, in that there is lacking in the original complaint any allegation of a written contract between Railroad and Union which on its face is discriminatory against appellants, whereas in the two cases just cited there was such a contract, ignores the realities of collective bargaining. The District Court held, in effect, that as long as the discriminatory practices are not expressed in any written contract made by Railroad and Union, there is no breach of its duty by Union, even though the practices are perpetrated with its tacit approval.

It is true that in the original complaint the participation by Union was expressed by the term "connivance". It is true that the District Court said that the word "connivance" cannot, without severe strain, be taken to mean "participation through contracting". (Tr. 142.) In this, however, we think that the District Court erred. Surely, Congress did not intend by the Railway Labor Act to empower the collective bargaining representative to discriminate against any of the employees it represented as long as this discrimination was not expressed in the terms of a specific written agreement between the collective bargaining representative and the employer. Such a construction would put a premium upon subterfuge and would, in effect, nullify the principle established by the *Steele* and *Tunstall* cases, *supra*.

The District Court also said in its opinion that "simply stated, the complaint alleges only that the Union has permitted, through failure to prevent, the

existence of the alleged discriminatory practices of the Railroad". (Tr. 142.) Even the definition of "connivance", cited in the opinion taken from *Branden v. Holman*, 41 F. (2d) 586, 588, does not bear out the conclusion reached by the District Court. That definition is:

"Connivance with others may be committed by *passive permission* or failure to prevent, or helping by not hindering when it is one's duty to prevent, or by negligence, or by voluntary oversight." (Tr. 142.) (Italics supplied.)

Again we submit that the Congress never intended to empower the collective bargaining representative to perpetuate discriminatory practices against any of the people it represents through "passive permission". "Passive permission" certainly partakes of the character of collective bargaining, and if the evils complained of in the original complaint were the result of affirmative action on the part of the Railroad, with the passive permission of Union, there was clearly a breach of the duty cast upon the Union by the Railway Labor Act not to exercise its powers in such manner as to discriminate against any of the employees represented by it, solely and exclusively because of race.

Nevertheless, rather than take an immediate appeal from the order dismissing the original complaint, it seemed wiser to re-cast the allegations of the original complaint so as to allege that the discriminatory practice complained of was perpetuated through contractual action on the part of Union. Accordingly, the original complaint, with the exceptions already noted,

was set forth in the first cause of action of the amended complaint. And in the second cause of action contractual action by Union, as a part and parcel of the collective bargaining process, was alleged. This was done so as to give the District Court an opportunity to reconsider its ruling in the light of the rephrased amended complaint.

For the convenience of the Court, we are setting forth the essential allegations of the second cause of action of the amended complaint which contain the new matter not incorporated specifically in the original complaint or in the first cause of action in the amended complaint.

“II

Prior, however, to the effective date of the said agreement, defendants Railroad and Union had, by mutual understanding and verbal agreement, conspired together to discriminate against Negro employees in the dining car department of Railroad by arbitrarily assigning to Negroes, when first employed by Railroad, seniority dates in Group B, as defined in Part I, Article IV, Rule 19, of said Agreement, and in Classes 4 and 5, as defined in Part I, Article IV, Rule 20 of said Agreement, whereas white persons when first employed were arbitrarily assigned seniority dates in Group A as defined in said Rule 19, and in Classes 2 and 3, as defined in said Rule 20; and by reason of the discrimination thus practiced by Railroad and Union against Negroes and in favor of white persons, the pay and allowances of the latter were materially larger than the pay and allowances of the former, although the Negroes were no less competent, able and experienced than

the white persons. The basis for the said discrimination against the Negroes was solely because of their race.

The said Agreement did not provide any standard or yardstick by which it could be determined in which of the several seniority groups and classes new employees should be given seniority dates. But the said agreement was negotiated in the light of the existing practice, and the existing practice was, by Railroad and Union during said negotiations and after the effective date of the Agreement, adopted by verbal agreement and understanding between Railroad and Union, as the method of determining seniority dates in the several groups and classes defined in said Rules 19 and 20; and by this adoption by Railroad and Union, the said Agreement was modified in violation of the Railway Labor Act and for the purpose of discriminating against Negro employees in the dining car department of Railroad; and thus modified, the entire contract was, has been ever since its effective date, and now is, discriminatory against Negroes in the employ of defendant Railroad in its dining car department.

That the whole purpose of incorporating in the said Agreement Rules 19 and 20, was to give recognition to the said discriminatory practice which had previously existed prior to the effective date of said Agreement, and that the said Agreement was negotiated and entered into by Railroad and Union for the express purpose of perpetuating the said discriminatory practice and using the same as the standard or yardstick for the determination in which of the several seniority groups and classes new employees should be given seniority dates.

That in accordance with the said discriminatory agreement, plaintiffs at the time they established their employment relationship, were by Railroad, and pursuant to said Agreement with Union, assigned to that certain seniority group known as B, as defined in said Rule 19, whereas white persons were at the time when they established an employment relationship, assigned by Railroad pursuant to said Agreement, to seniority Group A, as defined in said Rule 19.

Moreover, plaintiffs at the time they established their employment relationship, were by Railroad, pursuant to said Agreement with Union, assigned to the fourth and fifth seniority classes, as defined in said Rule 20, whereas white persons in the dining car service of Railroad were at the time their employment relationship was created, assigned by Railroad, pursuant to said Agreement with Union, either as Class 2 or Class 3 employees, as defined in said Rule 20; and by reason of the said discriminatory treatment, and in accordance with the said discriminatory Agreement, the pay and allowances of white persons were materially larger than the pay and allowances of plaintiffs, although there was no distinction between the ability and competence of plaintiffs and said white persons.

“III

Under the terms of said Agreement, and particularly Part I, Article IV, Rule 17, subdivision (c), it was impossible for plaintiffs to obtain a seniority date and accumulate the seniority in a higher class than that to which they were assigned at the inception of their employment relationship, except in accordance with the terms of

said Rule 17, which provides that an employee will be accorded a seniority date in a higher group or class in which he has not previously acquired a seniority date only upon assignment by bulletin to a bulletined position or vacancy in such higher group or class and the seniority date so accorded will be the date of assignment and will also be accorded in all intermediate groups and classes, and an employee assigned to a position in a lower group or class will retain the seniority dates held in all lower groups and classes and continue to accumulate seniority therein.

However, plaintiffs have been and always will be as long as they remain in the employ of Railroad, at a serious disadvantage in competition with white persons because they, as a result of the discriminatory Agreement, will be unable to compete with white employees in the dining car service of Railroad and build up seniority in higher seniority groups and classes than those to which they were initially assigned; whereas white persons employed initially in higher groups and classes, will from the very day of their first employment, begin to build up seniority in such higher groups and classes to such an extent that the Negro employees have not been, are not, and will never be able to compete with the said white employees with respect to bulletined positions in the higher seniority groups and classes." (Tr. 154-158, incl.)

The theory of the second cause of action is that the collective bargaining agreement was negotiated in the light of an existing discriminatory practice; that the agreement itself did not provide any standard for the classification of new employees at the time

they were initially employed with respect to seniority dates; and that the absence of a standard was supplied by the existing discriminatory practice. In other words, the contract was left purposely without any standard of application of seniority dates in particular groups and classes so that the existing discriminatory practice could be continued and serve as the rule by which seniority dates in the various groups and classes would be assigned upon initial employment of new employees in a manner highly discriminatory against the appellants.

It is our contention that, under these circumstances, the contract itself, although not discriminatory on its face, became discriminatory as a result of contractual or consensual action between Railroad and Union. The interpretation of a contract agreed upon between the parties is certainly a part of the collective bargaining process. And there is no doubt that Union and Railroad negotiated and executed the collective bargaining agreement with the full knowledge that it did not contain any standard providing for the assignment, upon initial employment, of new employees to any specific seniority group or class, but that the lack of a standard would be supplied by an adoption of the existing discriminatory practice.

In the case of *Graham v. Brotherhood of L. F. & E.*, decided at the October Term 1949 (94 L.Ed. Adv. Op. 1), in which the Court said that the issues in the *Graham* case were substantially indistinguishable from the *Steele* (323 U.S. 192, 89 L.Ed. 173) and *Tunstall* (323 U.S. 210, 89 L.Ed. 187) cases, the Court itself

construed its holding in these two older cases. In the opinion of the Court, by Mrs. Justice Jackson, the following language appears with reference to the *Steele* and *Tunstall* cases:

“* * * We pointed out that the statute which grants the majority exclusive representation for collective bargaining purposes strips minorities within the craft of all power of self-protection, for neither as crafts nor as individuals can they enter into bargaining with employers on their own behalf. * * * And we held that the abuse of its powers by perpetrating discriminatory employment practices based on racial consideration gives rise to a cause of action under federal law which federal courts will entertain and will remedy by injunction.” (at p. 5.)

The abuse of power referred to in the above quotation is abuse by a sole collective bargaining representative. Thus, the Supreme Court itself, in construing the *Steele* and *Tunstall* cases, has said that discriminatory practices based upon racial considerations are forbidden just as much as discrimination founded upon a contract in writing between the collective bargaining representative and the Railroad.

CONCLUSION.

It is submitted that both the original complaint and the proposed amended complaint set forth in clear and unmistakable terms a discriminatory practice by the concurrent action of Railroad and Union, and that this action by Union is a violation of the grant

of authority conferred upon it as sole collective bargaining representative of appellants by the Railway Labor Act. If this be true, it follows that a cause of action is stated within the jurisdiction of the District Court and of this Court, and that the orders of dismissal for lack of jurisdiction should be reversed and that the cause should be remanded to the District Court for further proceedings in accordance with the opinion of this Court.

Dated, San Francisco, California,
June 16, 1950.

Respectfully submitted,

HAROLD M. SAWYER,

Solicitor for Appellants.

ARCHIBALD BROMSEN,

GLADSTEIN, ANDERSEN, RESNER & LEONARD,

Of Counsel.

(Appendix Follows.)

Appendix

JURISDICTION.

28 U.S.C. § 1291 reads as follows:

“§ 1291. *Final decisions of district courts*

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.”

28 U.S.C. § 1337 (Judicial Code) reads as follows:

“§ 1337. *Commerce and anti-trust regulations*

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.”

Railway Labor Act, § 2; 45 U.S.C. § 152, reads as follows:

“§ 152. *General duties—Duty of carriers and employees to settle disputes*

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier

growing out of any dispute between the carrier and the employees thereof.

Consideration of disputes by representatives

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Designation of representatives

Third. Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden

Fourth. Employees shall have the right to organize and bargain collectively through repre-

sentatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, that nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Agreements to join or not to join labor organizations forbidden

Fifth. No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or

not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

Conference of representatives; time; place; private agreements

Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided*, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further*, That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Change in pay, rules, or working conditions contrary to agreement or to section 156 forbidden

Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working

conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

Notices of manner of settlement of disputes; posting

Eighth. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this chapter, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Disputes as to identity of representatives; designation by Mediation Board; secret elections

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify

the same to the carrier. Upon receipt of such certification the carrier shall treat with the representatives so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Violations; prosecution and penalties

Tenth. The willful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than \$1,000, nor more than \$20,000, or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or

agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any district attorney of the United States to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided*, That nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent. May 20, 1926, c. 347, § 2, 44 Stat. 577; June 21, 1934, c. 691, § 2, 48 Stat. 1186."

No. 12,509

IN THE

United States
Court of Appeals

For the Ninth Circuit

THOMAS E. HAYES, et al., on Behalf of
Himself and All Others Similarly
Situated,

Appellants,

vs.

UNION PACIFIC RAILROAD Co. (a corpora-
tion) and DINING CAR EMPLOYEES UN-
ION LOCAL 372 (a voluntary unincorpor-
ated labor organization); and JAMES
G. BARKDOLL, as District Director of
said Local 372 in the District of Los
Angeles, State of California,

Appellees.

Brief for Respondent
Dining Car Employees Union Local 372

BROBECK, PHLEGER & HARRISON,
MARION B. PLANT,

111 Sutter Street,
San Francisco 4, Calif.,

*Attorneys for Respondent
Dining Car Employees
Union Local 372.*

FILED

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PAUL P. O'BRIEN,
CLERK

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ated labor organization); and JAMES
G. BARKDOLL, as District Director of
said Local 372 in the District of Los
Angeles, State of California,

Appellees.

Brief for Respondent
Dining Car Employees Union Local 372

STATEMENT OF THE CASE

For convenience, and because appellant Hayes was in fact the only party plaintiff below,¹ we refer to him in this brief as the "appellant".

1. See pages 15-16, *infra*.

After appellant's original complaint had been twice amended and a supplemental complaint had been filed, the trial court filed a written opinion and order granting respondents' motions to dismiss the complaint upon the ground that it did not state a claim for relief under the Railway Labor Act and hence did not state a claim within the court's jurisdiction (R. 136). Appellant then moved for leave to file an amended complaint (R. 144). The motion was denied (R. 163), and judgment was entered for the respondents (R. 164). The appeal thus presents two questions:

- (1) Whether the trial court erred in granting the motions to dismiss the complaint;
- (2) Whether the trial court abused its discretion in denying leave to file the proposed amended complaint.

We mention the foregoing at the outset because, while appellant's statement of the points on which he relies clearly recognizes the existence of the two separate questions (R. 178), his brief does not always do so, but on the contrary tends to confuse them.

We turn to the facts pertinent to the two questions.

A. The Order Granting the Motions to Dismiss.

The complaint alleged that there had been in effect since June 1, 1942, a collective bargaining contract between the Railroad and the Union providing for certain seniority groups and classes (R. 5), and that the Railroad had discriminated against plaintiff and other Negroes because of their race by denying them seniority in the higher groups

and classes (R. 5-8). More particularly, the complaint alleged that whereas the Railroad assigned newly employed white men to Group A, it assigned newly employed Negroes to Group B (R. 5-6), and that whereas it assigned newly employed white men to Classes 1 and 2, it assigned newly employed Negroes to Class 3 (R. 6); that bids by Negro employees for bulletined positions in Group A, and in Classes 1 and 2, to which they were entitled by reason of seniority, were rejected by the Railroad in favor of the bids of white men having less seniority (R. 7); and that the Railroad employed Negroes in positions in Group A and in Classes 1 and 2 without, however, assigning them seniority dates therein (R. 7-8). The only charge against the Union was that these alleged discriminatory acts of the Railroad were done with the Union's "connivance" (R. 5, 6, 7, 8).

It should be noted that the complaint asserted no claim that the collective bargaining contract discriminated in any way against Negroes. On the contrary, it apparently was the theory of the complaint that Negro employees had in practice been denied rights to which the contract entitled them or had been discriminated against in respect to matters not covered by the contract.

As revealed by its opinion (R. 136 et seq.), the trial court granted the motions to dismiss because there was no claim that the Union had made a discriminatory contract and that the Railroad was accepting the benefits of such a contract, as was the case in *Steele v. L. & N. R. Co.*, 323 U.S. 192, *Tunstall v. Brotherhood*, 323 U.S. 210, and *Graham v. Brotherhood of Locomotive Firemen and Engineers*, 338 U.S. 232, being the cases upon which appellant relied. The

charge against the Railroad was, not that it was accepting the benefits of a discriminatory contract, but that it was engaging in discriminatory practices without reference to the provisions of the contract. The charge against the Union was not that it had contracted away the rights of Negroes, but that, having made a non-discriminatory contract, it thereafter failed to take action to remedy discriminatory practices engaged in by the Railroad in the face of the contract.

In the latter connection, the court pointed out that "connivance" means simply "corrupt or guilty assent to wrongdoing, not involving actual participation in it, but knowledge of, and failure to prevent or oppose it" or "failure to prevent, or helping by not hindering when it is one's duty to prevent" (R. 142). As we shall show in the argument to follow, the Railway Labor Act imposed no duty upon the Union to take action in the circumstances alleged in the complaint; on the contrary, it did not even confer authority to act.

B. The Denial of Leave to Amend.

The Factual Background Against Which the Motion for Leave to Amend Was Made

When appellant, after the motions to dismiss were granted, moved for leave to file an amended complaint, his original complaint had already been twice amended (R. 140), without correcting the deficiencies above noted.

Furthermore, facts developed by affidavits which were on file showed the allegations of his proposed amended complaint to be pure sham. One of these affidavits had been filed by the Railroad in support of objections to interrogatories which had been addressed to it by appellant (R. 17).

The others had been filed by both respondents (R. 25, 43, 80, 110, 111) and appellant (R. 60, 102) in connection with the motions to dismiss. While the court, in its opinion granting the motions to dismiss, did not refer to the affidavits except for certain background facts,² the affidavits were before it when appellant moved for leave to amend and the facts shown thereby were properly considered by the court in the exercise of its discretion as to whether leave to amend should be granted.³ The facts thus shown by the record were as follows:

First, the record showed that the Union admits Negroes to membership on exactly the same terms and conditions as white men, that it has a substantial Negro membership, that it numbers Negroes among its officers, and that two Negro officers participated in the negotiation and execution of the contract. These facts were set forth in the affidavit of Stephen R. Auguston, the Union General Chairman (R. 25), which affidavit showed that the Union had approximately 140 Negro members employed upon the Railroad's dining cars (R. 26), that two of the Union's four District Chairmen were Negroes (R. 26) and that these two Negroes were among the officers of the Union who negotiated and executed on its behalf the collective bargaining contract referred to in the complaint (R. 26-27). These facts were not contradicted. The only reference to them by appellant was in an affidavit in which he stated (R. 69):

2. The court drew upon the affidavits for detail not supplied by the complaint itself as to the contractual provisions governing seniority (R. 137-138).

3. Thus, in its judgment of dismissal rendered upon denial of leave to amend, the court recited consideration of the affidavits (see pages 14-15, *infra*).

"It is true that defendant Local 372 does admit Negroes to membership and ostensibly upon the same terms and conditions as white persons, but it is not true and the maker of the affidavit knew it was not true that the Negroes have been accorded exactly the same rights and privileges as white men without any differentiation of any kind or nature between the two.

"Defendant Local 372 is the collective bargaining agent of all its members and is required by law to represent all without discrimination. Yet ever since the collective bargaining agreement of 1942 was executed, the officers of defendant Local 372, notably including the affiant Stephen R. Auguston, have with full knowledge of the facts, failed to take any remedial action on behalf of the Negro members of the Local against the discriminatory practices of defendant railroad against its Negro employes in the Dining Car Department."

Second, the affidavits confirmed that the collective bargaining contract does not discriminate against Negroes, but on the contrary guarantees Negroes exactly the same rights as white men without differentiation of any kind. The relevant provisions of the contract were set forth in an affidavit by H. I. Norris, assistant manager of the Railroad's dining car department (R. 43), and were not disputed. The contract classifies the Railroad's dining cars in four Groups (AA, A, B and C; R. 44) according to the type of service offered (R. 47), and provides for five job Classes (chef-caterers,⁴ chefs, second cooks, third cooks and fourth cooks; R. 44). It provides for a ninety day probationary period for new employees, and for assignment of a sen-

4. Chef-caterers are employed only on Group AA trains (R. 46).

iority date in the Class and Group in which the probationary period is completed and in all corresponding and lower Classes in the same and lower Groups (R. 52). It further provides that vacancies shall be bulletined for bidding and shall be assigned on the basis of seniority, provided that the bidder has the requisite fitness and ability (R. 50-51). It is apparent from a reading of these provisions that they do not discriminate in any way against Negroes, and this fact was conceded by appellant. Thus he stated in one of his affidavits (R. 69-70) :

“On page 3, line 15, of the Auguston affidavit, the following statement appears :

“‘Said agreement secures to Negroes exactly the same rights and privileges as white men and does not differentiate in any way between the two.’

“This statement is verbally true, but it ignores the real issue, which is discrimination against Negroes at the time they are hired by the defendant railroad.”

Third, the affidavits confirmed that, even assuming the Railroad to have engaged in the discriminatory practices alleged, the Union was guilty only of failure to take remedial action. The Auguston affidavit showed in substance that the Union did not discriminate against Negroes in any way (R. 26) and that the Union did not have any part in any discriminatory practices in which the Railroad may have engaged (R. 28-29). Appellant's only reply to this showing was his statement above quoted that the Union's officers “have with full knowledge of the facts, failed to take any remedial action on behalf of the Negro members of the Local against the discriminatory practices of defendant railroad” (R. 69).

Fourth, the affidavits showed that the Railroad had in fact not engaged in the discriminatory practices alleged.
More particularly:

(a) Appellant was forced to concede that his allegation that the Railroad rejected Negro bids for positions in Groups A and AA and Classes 1 and 2, and thus denied Negroes seniority in such groups and classes, was false (R. 77). This concession was wrung from him by the fact, as shown by the Auguston affidavit, that appellant himself held seniority in Group A with a seniority date of July 7, 1948 (R. 28), and that of the 71 Negroes listed in the appendix to the complaint whom Auguston had been able to identify, 61 held seniority in Groups A or AA, and 15 held seniority in Class 2 (R. 28-32). Appellant, as he notes in his brief (p. 10), therefore abandoned the allegations above mentioned and omitted them from his proposed amended complaint. After the filing of the Auguston affidavit, appellant based his case entirely upon the alleged discrimination in the initial assignment of newly employed Negroes (R. 61-62, 71-72, 75, 77-78, 109, 170-172).

(b) In respect to the sole remaining claim, namely, that of discrimination in the initial assignment of new employees, the affidavits again showed that there was in fact no such discrimination. In this connection, two affidavits (R. 80, 111) by H. A. Hansen, manager of the Railroad's dining car department, supplied detailed information as to the initial assignment of all employees, white and colored, who had worked for the railroad in the cooks' craft at any time during the four years preceding the commencement of the action. The facts shown by these affidavits were challenged by appellant only in the respect and to the extent hereinafter noted. We turn to a consideration of these facts.

The first of the two Hansen affidavits stated that a total of 946 persons, white and Negro, had worked for the Railroad in the cooks' craft during the four years preceding the commencement of the action and then set forth a schedule showing the initial seniority assignments of these 946 persons when first employed (Tr. 82). The schedule is here reproduced for the Court's convenience:

White			Negro		
Group	Class	No.	Group	Class	No.
AA	3 (Second Cooks)	2	AA	5 (Fourth Cooks)	10
AA	4 (Third Cooks)	9	A	2 (Chefs)	2
AA	5 (Fourth Cooks)	56	A	3 (Second Cooks)	13
A	2 (Chefs)	7	A	4 (Third Cooks)	39
A	3 (Second Cooks)	46	A	5 (Fourth Cooks)	254
A	4 (Third Cooks)	36	B	2 (Chefs)	4
A	5 (Fourth Cooks)	189	B	3 (Second Cooks)	27
B	4 (Third Cooks)	3	B	4 (Third Cooks)	64
B	5 (Fourth Cooks)	15	B	5 (Fourth Cooks)	165
		<hr/> 363	C	2 (Chefs)	1
			C	4 (Third Cooks)	4
					<hr/> 583

Preliminarily, it may be noted that of 283 employees assigned initially to Group B trains, 265 were Negroes. These figures indicate simply that in staffing its Group B trains (mostly the so-called Challengers) the Railroad hired Negroes almost exclusively. Any discrimination involved in this practice was discrimination, not against Negroes, but in their favor and against white applicants. The pertinent question is, not whether the Railroad discriminated in favor of Negroes in staffing Group B trains, but whether it discriminated against them in staffing Group A and AA trains.

Along the same line, it should be noted that all of the 18 white men who were assigned initially to Group B were assigned to the two lowest Classes, 4 and 5. Only Negroes were assigned initially to the higher classes. Appellant himself was initially assigned to Class 3⁵ (second cook) and so admitted (R. 67). Indeed, appellant made no attempt to contradict any of the above figures relative to the Classes to which new employees in Group B were assigned. Those figures plainly cannot be reconciled with appellant's claim that white men were assigned to the higher Classes and Negroes discriminatorily confined to the lower.

Turning now to trains in Groups A and AA, a total of 663 employees were assigned initially to these groups and were accorded seniority therein. Of this total, 318, or approximately one-half, were Negroes. Appellant countered only with the assertion, the materiality of which is not apparent,⁶ that no Negroes, with one exception, had

5. At this point it should be noted that whereas the original complaint alleged that newly employed white men were assigned to Classes 1 and 2 and that Negroes were confined to Class 3 and lower, the proposed amended complaint alleged that newly employed white men were assigned to Classes 1, 2 and 3, and that Negroes were confined to Class 4 and lower (see page 13, *infra*). Since we are considering the initial employment data with reference to the allegations of the proposed amended complaint, our breakdown of the data in this and subsequent portions of our brief is between Classes 1, 2 and 3, on the one hand, and Classes 4 and 5 on the other.

6. We say that the materiality of the assertion is not apparent because if it were true that the initial employment and assignment to Groups A and AA of all of the 318 Negroes in question took place more than four years prior to commencement of the action, that fact would be entirely inconsistent with the allegation of the proposed amended complaint that prior to, at the time of, and subsequent to execution of the contract of June 1, 1942, it was the Railroad's practice to assign all newly employed Negroes to Group B (see page 13, *infra*).

been initially assigned to Groups A or AA within four years preceding the commencement of the action (R. 103, 104). This assertion plainly was not "made on personal knowledge"⁷ and was in fact false, for a further affidavit by Hansen listed all of the 318 Negroes above-mentioned and the respective dates of their initial employment and showed that 247 were hired within four years preceding the commencement of the action (R. 114, 117, 118-119, 120, 129-135), including 10 of the Negroes listed in the appendix to the complaint (R. 123).⁸ Appellant attempted no reply to this showing.

As for the job classes to which employees initially hired in Groups A and AA were initially assigned, the showing was not as strong but nevertheless was entirely inconsistent with appellant's claim that Negroes were denied assignment to the higher classes. Of the total of 663 employees, white and Negro, initially employed in Groups A or AA, 70 were initially employed in Classes 1, 2 and 3⁹ and were

7. See Rule 56(e), Rules of Civil Procedure, providing with respect to motions for summary judgment that "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." We know of no reason why assertions made without personal knowledge should be given weight in reviewing exercise by a trial court of its discretionary power to deny leave to amend.

8. It is in face of the above fact that appellant asserts with emphasis at page 25 of his brief that "the fact remains undisputed that every one of the appellant Negro cooks, when first employed by Railroad in its dining car service as a cook, was arbitrarily given a seniority date in Group B."

9. See note 5, page 10, *supra*. At page 25 of his brief appellant apparently forgets that his proposed amended complaint alleged that newly employed Negroes were confined to Classes 4 and 5 and states with emphasis that they were assigned to "Classes 3 or 4."

accorded seniority therein. Among those 70 were 15 Negroes.

Appellant's affidavits were, of course, replete with vituperative general assertions that the Railroad had discriminated against Negroes at the time of initial employment. But those general assertions, made without personal knowledge of the facts and without any showing of competency to testify thereto, furnish no basis for disturbing the discretionary action of the trial court.¹⁰ Appellant did not produce the affidavits of any of the 87 Negroes listed in the appendix to his complaint, to whom he referred as fellow "plaintiffs," and who presumably would have been competent to testify as to the facts of their own employment. As for appellant's employment, he was forced to admit that he was initially employed and assigned seniority in Class 3 (R. 67), and it was in the face of this admission that he sought to allege in his amended complaint that Negroes, when initially employed, were confined to Classes 4 and 5 (R. 151, 154, 156).

The Proposed Amended Complaint

It was against the foregoing background that appellant moved for leave to amend. We turn now to the allegations of the proposed amended complaint.

Unlike the original complaint, the proposed amended complaint contained two counts. The first count was the same as the original complaint except that it dropped the allegations regarding rejection of bids (see appellant's brief, p. 10) and that whereas the original complaint had alleged that newly employed white men were initially as-

10. See note 7, page 11, *supra*.

signed to Classes 1 and 2 and newly employed Negroes were confined to Class 3, or lower (R. 6), the amended complaint alleged that newly employed white men were initially assigned to Classes 1, 2 and 3 and that newly employed Negroes were confined to Classes 4 and 5 (R. 151, 154, 156). Appellant proposed to make this allegation in the face of the admitted fact that he himself had been initially assigned to Class 3 (R. 67).

It was upon the second count that appellant relied to correct the deficiencies of the original complaint. This count was the same as the first except that it alleged in substance that prior to execution of the contract of June 1, 1942, it was the practice to discriminate against Negroes by "arbitrarily assigning to Negroes, when first employed by Railroad, seniority dates in Group B * * * and in Classes 4 and 5" (R. 154), that the contract of June 1, 1942, "did not provide any standard or yardstick by which it could be determined in which of the several seniority groups and classes new employees should be given seniority dates" (R. 155)¹¹ and that the Railroad and the Union entered into a contemporaneous "verbal agreement" for continuance of the existing practice, thereby "modifying" the written contract (R. 155).

The following should be noted:

First, the allegation that the written contract did not contain any standard for determining the seniority group and class of new employees was false. Rule 17(b) of the contract provides in plain terms that a new employee, on the completion of the first ninety days of continuous service,

11. At page 23 of his brief, appellant erroneously states that this allegation also was contained in his original complaint.

is to be accorded a seniority date "in the seniority class and group in which such ninety days of continuous service is completed, in all lower classes in that group, and in all corresponding and lower classes in all lower groups" (R. 52).

Second, the allegation that the Union entered into a "verbal agreement" with the Railroad was contrary to the implicit concession theretofore made that the Union had been guilty only of a failure "to take any remedial action on behalf of the Negro members of the Local against the discriminatory practices of the railroad" (see page 7, *supra*). Although appellant had shown no reluctance to make sweeping and irresponsible assertions in his affidavits, he nevertheless had not even suggested the existence of a verbal agreement such as he sought to allege in his amended complaint. Furthermore, the allegation of a "verbal agreement" by which the written contract was "modified" was contrary to the allegation of both the original and proposed amended complaints that "At all times herein mentioned" the written contract "was and now is in full force and effect" (R. 5, 150).

Third, the allegation of a continuation of the alleged discriminatory practice was contrary to the showing theretofore made, as hereinabove set forth, that there has in fact been no such discrimination (see pages 8-12, *supra*) and, in so far as plaintiff himself was concerned, was contrary to his own admission theretofore made that he had been initially assigned to Class 3 (see page 10, *supra*).

C. The Judgment.

After denying appellant's motion for leave to amend, the court signed a formal judgment of dismissal which recited that the court, after considering the complaint, the amend-

ments thereto, the affidavits filed by the parties, and the statements of counsel, had concluded that there was no genuine issue as to any material fact (R. 164-175). Appellant's brief remarks (p. 9) that while the order granting the motion to dismiss was based solely on lack of jurisdiction, "the judgment of dismissal purports not only to rule on the question of lack of jurisdiction, but also upon other matters presented by the defendants." We assume that appellant refers to the fact that the judgment referred to the motions to dismiss as having been granted because of failure to state a claim as well as lack of jurisdiction. The fact is, of course, that the trial court's decision that it lacked jurisdiction was based on a holding that the complaint failed to state a claim under the Railway Labor Act. The reference in the judgment to the complaint, the amendments thereto, the affidavits filed by the parties and the statements of counsel, reveals that the court considered these matters (and properly so, as we shall see) in passing on the motion for leave to amend.

D. The Parties.

Before proceeding with the argument, there remains to be straightened out the matter of parties. The original complaint alleged that appellant Hayes brought the action on his own behalf and on behalf of others similarly situated, including 97 persons listed in the appendix. The complaint thus was phrased as one in a so-called spurious class action under Rule 23a of the Rules of Civil Procedure (see Moore's Federal Practice (2d ed.) pp. 3442 et seq.). While appellant referred to the persons listed in the appendix as "plaintiffs" they in fact were not parties plaintiff and could be-

come such only by appropriate motion to intervene as provided by Rule 24 (Moore's Federal Practice (2d ed.) pp. 3473 et seq.).

In the proposed amended complaint, appellant Hayes purported to join with himself as parties plaintiff a large number of other persons, including most of those listed in the appendix to the original complaint, none of whom had applied for or obtained leave to intervene. If the motion for leave to file the amended complaint were itself to be regarded as a motion for leave to intervene, the question whether such leave should be granted was addressed to the trial court's discretion (Rule 24(b)). Such leave was, of course, properly denied if appellant Hayes' own case was properly subject to a judgment of dismissal.

We mention the foregoing because the notice of appeal states that the appeal is by all of the persons named as parties plaintiff in the proposed amended complaint (R. 166-167) and the opening brief speaks of "Appellants". However, neither the statement of the points on which reliance is placed (R. 178), nor the opening brief raise any question regarding denial of leave to intervene, and we therefore assume that further comment upon the question is unnecessary.

Summary of Argument

As stated at the outset, the instant appeal presents two questions: (1) Whether the trial court erred in granting the motions to dismiss; and (2) whether the trial court abused its discretion in denying leave to file the proposed amended complaint. Our argument upon these two questions may be summarized briefly as follows:

1. The motions to dismiss the original complaint were properly granted because the complaint asserted no claim that the Union and the Railroad had entered into a discriminatory contract, but asserted only that the Union had failed to take action to remedy the alleged grievances of appellant and other Negroes against the Railroad. Appellant was competent to avail himself of legal remedies for any wrongs committed against him by the Railroad, and the Railway Labor Act neither conferred authority nor imposed a duty upon the Union to take action in his behalf.

2. The trial court did not abuse its discretion in denying leave to file the proposed amended complaint because appellant had already amended his complaint twice and because the record showed that the allegations of the proposed amended complaint were made without regard for the truth and were sham.

ARGUMENT

I. The Motions to Dismiss Were Properly Granted.

As heretofore noted, the only charge made against the Union by the original complaint was that the alleged discriminatory practices of the Railroad were carried on with the Union's "connivance". The word "connivance" means "intentional failure or forbearance to discover a wrongdoing; voluntary oversight; passive consent or co-operation" and in law "corrupt or guilty assent to wrongdoing, not involving actual participation in it, but knowledge of, and failure to prevent or oppose it". Webster's International Dictionary. See also Bouvier's Law Dictionary and *Brandon v. Holman*, 41 F.2d 586, 588, both quoted by the trial court. In the words of appellant himself, his complaint

was that the Union "with full knowledge of the facts, failed to take any remedial action on behalf of the Negro members of the Local against the discriminatory practices of defendant railroad". See page 7, *supra*. The question thus presented is whether the Railway Labor Act imposed a duty upon the Union to take such action. For reasons about to be stated, we submit that it did not.

In *Elgin, J. & E. R. Co. v. Burley*, 325 U.S. 711, the Supreme Court pointed out that the Railway Labor Act contemplates two types of disputes, namely, "disputes over grievances and disputes concerning the making of collective agreements" (325 U.S. at 722). It then held that while the Act vests the statutory collective bargaining agent with "exclusive authority to negotiate and to conclude agreements" (325 U.S. at 778), it does not vest the agent with such authority in respect to grievances, and that in order for a railroad union to conclude its members by a settlement of their grievances "authorization by them over and above any authority given by the statute was essential" (325 U.S. at 741). In short, the Court held that the Act does not itself confer authority upon the collective bargaining representative to act for its members in respect to grievances or wrongs suffered by them, but that such authority must be conferred by the affected members. We need add only that if the Act confers no authority to act, then it obviously imposes no duty to act.

The applicability of the foregoing to the case alleged by the original complaint herein is apparent. When the Union negotiated and executed the collective bargaining contract of June 1, 1942, it was acting in the field of its exclusive statutory authority and was under a statutory duty to

refrain from arbitrary exercise of that authority in a manner inimical to the interests of Negro employees. The original complaint asserted no claim of any breach of that duty. Appellant did not (and obviously could not) claim that the provisions of the written contract were discriminatory, and the claim of a contemporaneous verbal agreement was not asserted until the proposed amended complaint was offered.

If, after execution of the contract of June 1, 1942, the Railroad committed any wrong against appellant or any other Negro, then the individual wronged had his remedy against the Railroad either in proceedings under the Railway Labor Act or in the courts, and was perfectly competent to act for himself.¹² The Railway Labor Act does not deprive an employee of power to act for himself in respect to such matters; it is only in the field of negotiation and execution of collective contracts that the individual cannot act for himself but must rely upon the union in which exclusive authority is vested. In the field of grievances, the Union can act for the individual only pursuant to the individual's authorization. The Act itself confers no authority to act and, by the same token, imposes no duty to act.

The case of *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, and the other cases upon which appellant

12. We know of no legal or equitable remedies available to the Union which were not available to appellant. On the contrary, appellant, being the person allegedly wronged, would be the person to whom the law normally would look to institute proceedings. As for remedies other than legal remedies, the only course open to the Union would be to threaten or call a strike. We doubt its right to do so in view of the existing contract. In any event, we do not understand that there is any contention that the Railway Labor Act imposed upon the Union a legal duty to threaten or call a strike.

relies, are in complete accord with what we have said. In the *Steele* case the union there involved had taken affirmative action against Negroes whose interests it was supposed to represent by executing a discriminatory contract which deprived them of seniority rights and excluded them from employment. This action by the union was taken in the field of its exclusive statutory power and authority in which individuals were deprived of the right to act for themselves, a fact which the court emphasized in these words:

“Section 2, Second, requiring carriers to bargain with the representatives so chosen, operates to exclude any other from representing a craft. *Virginian Railway Co. v. System Federation*, supra, 545. The minority members of a craft are thus deprived by the statute of the right, which they would otherwise possess, to choose a representative of their own, and its members cannot bargain individually on behalf of themselves as to matters which are properly the subject of collective bargaining” (323 U.S. at 200).

The Court was of the opinion (323 U.S. at 202) that this exclusive statutory power and authority implied some commensurate statutory duty. But even in this field of exclusive authority, the Court did not go so far as to hold that the union was under a statutory duty to take affirmative action to protect minority interests; it held only that the union was under a duty to refrain from affirmative action destructive of minority interests:

“Unless the labor union representing a craft owes some duty to represent non-union members of the craft, at least to the extent of not discriminating against them as such in the contracts which it makes

as their representative, the minority would be left with no means of protecting their interests or, indeed, their right to earn a livelihood by pursuing the occupation in which they are employed" (Emphasis supplied) (323 U.S. at 201).

The cases of *Tunstall v. Brotherhood of Locomotive Firemen and Engineers*, 323 U.S. 210, and *Graham v. Brotherhood of Locomotive Engineers and Firemen*, 338 U.S. 232, involved substantially the same facts and were based upon the same grounds as the *Steele* case. The rationale of these decisions was summarized in the case last cited as follows:

"The *Steele* and *Tunstall* cases, *supra*, arose under circumstances almost indistinguishable from those of the instant case, and the complaints asked the same kind of relief. We held there that, as the exclusive statutory representative of the entire craft under the Railway Labor Act, the Brotherhood could not bargain for the denial of equal employment and promotion opportunities to a part of the craft upon grounds of race. We pointed out that the statute which grants the majority exclusive representation for collective bargaining purposes, strips minorities within the craft of all power of self-protection, for neither as groups nor as individuals can they enter into bargaining with the employers on their own behalf. *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342; *J. I. Case Co. v. Labor Board*, 321 U.S. 332; *Medo Photo Supply Corp. v. Labor Board*, 321 U.S. 678. And we held that abuse of its powers by perpetrating discriminatory employment practices based on racial considerations gives rise to a cause of action under federal law which federal courts will entertain and will remedy by injunction" (338 U.S. at 238).

In short, the foregoing cases hold that a railway union, in exercising its exclusive statutory power and authority to negotiate collective bargaining contracts, is under a corresponding statutory duty to refrain from arbitrary action destructive of minority interests. The complaint in the present case asserted no claim of any violation of that duty. All that was claimed was that the Union, having obtained a collective bargaining contract from the Railroad which guaranteed to appellant and other Negroes exactly the same rights as white men, thereafter left it to appellant to enforce those rights, or any other that he might have, with remedies of which he was fully competent to avail himself. We submit that the Union was under no statutory duty to do otherwise, that the complaint therefore did not state a claim under the Railway Labor Act, and that it therefore did not state a claim within the trial court's jurisdiction.

II. The Trial Court Did Not Abuse Its Discretion in Denying Leave to Amend.

A motion for leave to amend is addressed to the discretion of the trial court, and its ruling thereon will not be disturbed upon appeal in the absence of a showing that its discretion was abused. *C. E. Stevens Co. v. Foster & Kleiser Co.* (C.C.A. 9th), 109 F.2d 764, 768-769, reversed on other grounds, 311 U.S. 255. In the present case there is no such showing. On the contrary there were at least two good reasons for the trial court's action: first, appellant had already amended his complaint twice without avail; and second, his proposed amended complaint was sham and represented an attempt to trifle with the court.

A. PLAINTIFF HAVING ALREADY FILED TWO AMENDMENTS AND A SUPPLEMENTAL COMPLAINT, LEAVE TO FURTHER AMEND PROPERLY WAS DENIED.

The motions to dismiss and accompanying affidavits were filed on September 14 and 15, 1949 (R. 37, 42). The last of the counter and reply affidavits was filed on November 15, 1949 (R. 135), and the court rendered its opinion on the motions to dismiss on January 19, 1950 (R. 144). The motions to dismiss thus were the subject of hearing and consideration by the trial court over a period of four months. Prior to rendition of the court's opinion plaintiff had amended his complaint twice and had filed a supplemental complaint, all without correcting the deficiency for which the complaint was dismissed. This Court has held that these facts alone justify denial of leave to amend. *C. E. Stevens Co. v. Foster & Kleiser Co.*, supra.

B. THE PROPOSED AMENDED COMPLAINT WAS SHAM, AND LEAVE TO FILE IT WAS PROPERLY DENIED FOR THAT REASON.

A pleading may be stricken as sham on the basis of affidavits showing its falsity. *Herbert v. Cosby*, 17 N. J. Misc. 204, 7 A.2d 400; *McReavy v. Zeunes*, 215 Minn. 239, 9 N.W. 2d 924. If a pleading may be stricken on that basis, then certainly a motion for leave to file an amended pleading, which motion is addressed to the court's discretion, may be denied on the same basis. Thus, this Court has held that a trial court, in the exercise of its discretion, is not bound to accept a proposed amendment at face value, but may evaluate it in the light of facts shown by the record (indeed, in some circumstances, may look outside the record) and may properly deny leave to amend if the amendment would be false or unavailing. *Suren v. Oceanic S.S. Co.*

(C.C.A. 9th), 85 F.2d 324. Thus, leave to amend is properly denied where the amendment contradicts the original pleading (*Pelelas v. Caterpillar Tractor Co.* (C.C.A. 7th), 113 F.2d 629, cert. den. 311 U.S. 700), or where the court is not satisfied as to the truth of the proposed averments (*Winterbottom v. Casey* (E. D. Mich.), 283 F. 518). And where a plaintiff's original pleading has stated the facts in detail, the court is entitled to assume that the facts have been fully stated, and that no other facts could be truthfully alleged. *C. S. Smith Metropolitan Market Co. v. Food and Grocery Bureau of So. Cal.* (S.D. Cal.), 33 F. Supp. 539, 540; *Boro Hall Corp. v. General Motors Corp.* (S.D. N.Y.), 37 F. Supp. 99, 100, aff'd (C.C.A. 2d), 124 F.2d 822.

In the present case the motion for leave to amend was made against a factual background which, we submit, justified the trial court in concluding that the new allegations sought to be added were sham. As hereinabove noted, those allegations were that the written contract of June 1, 1942, "did not provide any standard or yardstick by which it could be determined in which of the several seniority groups and classes new employees should be given seniority dates" and that the Railroad and the Union entered into a contemporaneous "verbal agreement" under which newly employed Negroes were to be assigned to Group B and Classes 4 and 5, whereas newly employed white men were to be assigned to Group A and Classes 2 and 3 (see page 13, *supra*). In addition to his original complaint, plaintiff had filed two amendments, a supplemental complaint, and two lengthy affidavits, without setting forth the facts sought to be alleged in the foregoing averments or even hinting at their existence. Indeed, the proposed allega-

tions were contrary to the facts theretofore shown and conceded (see pages 13-14, *supra*), and were inconsistent with other allegations of both the original and amended complaints (see page 14, *supra*). Under these circumstances the court was justified in concluding that the pertinent facts had already been fully stated, that additional facts could not be truthfully alleged, and that the proposed new allegations were made without regard for the truth and were sham.

Furthermore, the trial court was justified in concluding that certain essential allegations carried over from the original complaint likewise were sham. We refer to the allegations to the effect that the Railroad, after making the alleged verbal agreement, actually engaged in the discriminatory practice of arbitrarily assigning newly employed Negroes to Group B and Classes 4 and 5. In appellant's own case (and after all it is appellant's case with which we are concerned), he had been assigned initially to Class 3 and had so admitted (see page 10, *supra*). The allegations likewise were shown by the record to be false with respect to Negroes generally (see pages 8-12, *supra*).

We submit that the trial court was justified in concluding from what it had learned in the proceedings upon the motions to dismiss that the allegations of the amended complaint were made without regard for the truth, and that the court, in the exercise of a sound discretion, properly denied leave to file it.

CONCLUSION

We submit that the motions to dismiss were properly granted and that the court did not abuse its discretion in denying leave to further amend. Judgment therefore was properly entered for the respondents. We respectfully submit that the judgment should be affirmed.

BROBECK, PHLEGER & HARRISON,
MARION B. PLANT,

*Attorneys for Respondent
Dining Car Employees
Union Local 372.*

No. 12,509

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THOMAS HAYES, *et al.*, on Behalf of Himself and All
Others Similarly Situated,

Appellants,

vs.

UNION PACIFIC RAILROAD Co. (a corporation) and DIN-
ING CAR EMPLOYEES UNION LOCAL 372 (a voluntary
unincorporated labor organization); and JAMES G.
BARKDOLL, as District Director of said Local 372 in
the District of Los Angeles, State of California,

Appellees.

BRIEF FOR APPELLEE UNION PACIFIC RAILROAD COMPANY.

T. W. BOCKES,
W. R. ROUSE,
ELMER COLLINS,
JAMES A. WILCOX,

1416 Dodge Street, Omaha, Neb.,

E. E. BENNETT,
EDWARD C. RENWICK,
MALCOLM DAVIS,
W. J. SCHALL,

CLERK 422 West Sixth Street, Los Angeles,

Attorneys for Appellee Union Pacific Railroad Company.

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Appellees.

BRIEF FOR APPELLEE UNION PACIFIC RAILROAD COMPANY.

Jurisdictional Statement.

One of the grounds upon which the District Court dismissed the action was that the Court lacked jurisdiction of the subject matter of the action since it was not a civil action arising under an act of Congress regulating commerce, 28 U. S. C., par. 1337, which was the only basis for jurisdiction asserted by Appellant. The District Court's judgment should be affirmed on that ground and for other reasons hereafter stated. It is conceded that this Court has jurisdiction of the appeal under 28 U. S. C., par. 1291.

Statement of the Case.

(A) MOTIONS INVOLVED.

On motion of the Appellees the District Court dismissed the original complaint for lack of jurisdiction and also for failure to state a claim upon which relief could be granted. In passing upon the latter ground the Court considered the affidavits presented by all parties and determined that there was no genuine issue as to any material fact. Under Rule 12(b) of Rules of Civil Procedure the judgment on this ground was a summary judgment for the Appellees. The motion of this Appellee to dismiss the original complaint was also on the additional ground that there was an administrative remedy under the Railway Labor Act available to Appellant which had not been availed of. The District Court did not pass upon this ground which nevertheless supports its judgment. The District Court also denied Appellant's motion for leave to file an amended complaint. This appeal concerns the correctness of the action taken by the District Court on the foregoing motions.

(B) FACTUAL BACKGROUND.

The material facts disclosed by the affidavits considered by the District Court are as follows:

The Appellee Union Pacific Railroad Company (hereinafter called "Railroad") is a common carrier by railroad subject to the Railway Labor Act. Appellee Dining Car Employees Union Local 372 (hereinafter called "Union") is the collective bargaining agent for the kitchen employees (hereinafter called "cooks craft") on the dining, cafe-lounge and other similar cars operated by Railroad. The Railroad and Union entered into an agreement dated June

1, 1942 (hereinafter called "agreement") governing the wages and working conditions of the cook's craft. The pertinent provisions of the agreement are set forth in the affidavit of H. I. Norris [Tr. 43-59]. The agreement provides for the four following separate seniority groups in each of which seniority is acquired with respect to a particular type of dining car service:

Group AA—Selective Runs (streamliner trains)

Group A —Standard Dining Car Runs

Group B —Challenger Runs

Group C —Cafe-lounge Car and similar runs.

The different seniority groups reflect the varying types of dining car service offered on the different classes of trains operated by Railroad. The most complicated menus and luxurious service which require employees of the highest skill, are offered on the Streamliner trains (Group AA) and the simplest menus and service which require employees of the least skill, are offered on cafe-lounge and similar cars (Group C).

With the exception hereinafter noted, the agreement provides for the following separate seniority classes within each seniority group, each seniority class including employees of different skill and experience from those in another class.

1. Chef-caterers
2. Chefs
3. Second Cooks and Coach Buffet Cooks
4. Third Cooks, Dish-up Men and Cafe Car Cooks
5. Fourth Cooks and Coach Buffet Cook's Helpers.

The skill and experience required in each class varies downward from the Chef-caterers class which class was established by the agreement only in seniority Group AA.

The rates of pay vary in each seniority group and class, the highest rates being paid in Group AA and in the Chef-caterer class.

The agreement provides the following rules relating to seniority and promotion. An employment relationship is established by 90 days continuous service in the cook's craft. Seniority is acquired in the group and class in which service is being rendered when an employment relationship is established. Seniority when acquired in a particular group and class also applies in all lower groups and classes. Seniority in a higher group or class is only acquired by being assigned to a non-temporary position and performing actual service therein. Service in temporary positions, which are available only temporarily because of sickness, leaves of absence, etc., of employees regularly assigned thereto, does not create seniority in the group and class in which temporary service is performed. All non-temporary positions are filled pursuant to bulletin issued by Railroad inviting all employees in cook's craft to apply or "bid." All employees desiring to be considered must submit written applications or "bids" within 10 days from date of bulletin, and assignment is made within 20 days from the same date. Employees are promoted on the basis of seniority, fitness and ability and except as to positions in Group AA, seniority governs promotions where fitness and ability are sufficient.

There is no provision in the agreement obligating Railroad to assign a new employee to any particular group or class, subject, of course, to the obligation to apply the

promotion rules where an existing employee of equal fitness and ability applies for a position available to new employees. All provisions of the agreement apply uniformly and without distinction to colored and white persons.

In practice new employees regardless of whether they are colored or white, are generally first employed in the inferior groups and classes.

Information concerning the manner in which the agreement has been applied by Railroad is contained in three affidavits of H. A. Hansen [Tr. 21-24; 80-99; 111-135] as well as in the Norris affidavit 946 persons (of which 363 are white and 583 are colored) have held an employment relationship in the cook's craft with Railroad at some time during the four-year period prior to the filing of the complaint. Some of these were first employed during said period and some prior thereto. At the time of the first employment of these persons, they were employed and first established seniority in the following groups and classes [Tr. 82]:

Group	White Class	No.	Group	Negro Class	No.
AA	3 (Second Cooks)	2	AA	5 (Fourth Cooks)	10
AA	4 (Third Cooks)	9	A	2 (Chefs)	2
AA	5 (Fourth Cooks)	56	A	3 (Second Cooks)	13
A	2 (Chefs)	7	A	4 (Third Cooks)	39
A	3 (Second Cooks)	46	A	5 (Fourth Cooks)	254
A	4 (Third Cooks)	36	B	2 (Chefs)	4
A	5 (Fourth Cooks)	189	B	3 (Second Cooks)	27
B	4 (Third Cooks)	3	B	4 (Third Cooks)	64
B	5 (Fourth Cooks)	15	B	5 (Fourth Cooks)	165
		—	C	2 (Chefs)	1
		363	C	4 (Third Cooks)	4
					—
					583

The names and dates of original hiring of each of the colored employees listed in the above tabulation is set forth

in affidavit of H. A. Hansen notarized November 12, 1949 [Tr. 111-135]. Both colored and white persons have been promoted under the agreement strictly in accordance with the seniority and promotion rules and without distinction on account of race. As a result, substantial numbers of negroes held seniority in all groups and classes as of July 6, 1949, the date upon which the original complaint was filed in this case. Of 507 cooks holding seniority in the two highest seniority groups at that time, 319 were colored and 188 were white segregated as follows [Tr. 23]:

<u>COOKS HOLDING GROUP AA AND GROUP A SENIORITY AS OF JULY 6, 1949</u>								
<u>Chef-Caterers— Chefs</u>		<u>2nd Cooks</u>		<u>3rd Cooks</u>		<u>4th Cooks</u>		
White	Colored	White	Colored	White	Colored	White	Colored	
41	16	37	31	21	18	13	19	
<u>COOKS HOLDING GROUP A BUT NOT GROUP AA SENIORITY AS OF JULY 6, 1949</u>								
<u>Chefs</u>		<u>2nd Cooks</u>		<u>3rd Cooks</u>		<u>4th Cooks</u>		
White	Colored	White	Colored	White	Colored	White	Colored	
37	61	19	53	11	56	9	65	
—	—	—	—	—	—	—	—	
Grand								
Total	78	77	56	84	32	74	22	84
Total:								
	White	188						
	Colored	319						

Appellant Hayes has seized upon the changes in service resulting from the discontinuance of all Challenger type trains and Group B dining car service by Railroad in 1947 to promote litigation with the Union and Railroad on the false charge of racial discrimination. Challenger trains providing sleeper service at less than standard fares and dining car service with adequate but simple menus at greatly reduced prices were initiated by Railroad in 1935. Many cooks who worked on these trains chose to

remain in Group B Seniority service although there were numerous occasions after the date of the agreement when assignments on standard dining cars carrying Group A seniority were available for bid to Group B personnel. The work in Group B service was less burdensome than in Group A service and the wage differential less than \$10.00 a month in favor of Group A. During the year 1947 all Challenger service was discontinued with the result that cooks holding Group B seniority could only exercise seniority rights in Group C and await an opportunity to establish a seniority date in Group A when positions become available. This obvious misfortune was suffered by white as well as colored cooks [Tr. 54-59].

On January 1, 1947, prior to the discontinuance of any of the Challenger trains, the following number of employees held seniority in the cook's craft in Groups A and B:

	Group A	Group B	Total
White	110	31	141
Colored	259	87	346

On January 1, 1948, subsequent to the discontinuance of all Challenger trains, the following number of employees held seniority in the cook's craft in Groups A and B:

	Group A	Group B	Total
White	97	12	109
Colored	250	49	299

[Tr. 57].

The result was that Appellant Hayes on behalf of some of the colored cooks holding Group B seniority made demand that Group B seniority dates be made applicable in Group A. In letter from Appellant Hayes to the General Chairman of the Union dated February 14, 1948, it was stated:

“We are demanding the following:

“(1) A complete elimination of all classes, AA, A, B and C because they have been used as a media to segregate and exploit the Colored cooks and to take from them the seniority which they have accumulated with the Union Pacific by their own labor.

“(2) That all cooks, regardless of Race, Color, Creed or National Origin, may exercise their seniority over any employee their junior on any train on the Union Pacific Railroad.” [Tr. 85.]

Such action would have adversely affected employees, both colored and white, holding seniority in Group A and would have violated the seniority provisions of the agreement. The Union which represents and admits to membership both colored and white employees has not asked Railroad to change the seniority provision of the agreement to carry out the desires of the group represented by Appellant Hayes.

(C) ISSUES INVOLVED.

The complaint was filed July 6, 1949 by Appellant Hayes, a negro, who purported to sue on behalf of 87 other negroes listed on Exhibit A, who are alleged to

be employees or former employees of Railroad. Appellant and such persons are hereafter called "plaintiffs." At the time the complaint was filed, Hayes and 71 of the 76 plaintiffs whom Railroad could identify as being then employed in the cook's craft had acquired a seniority date in Group A [Tr. 97]. The complaint charged Railroad with commission of the following wrongful acts:

(1) The assignment of plaintiffs to inferior groups and classes (Group B and Class 3—Second cooks) while assigning white persons when first employed to higher seniority groups and classes (Group A, and Class 1 or Class 2).

(2) Refusal to accept bids of plaintiffs for bulletined positions in higher groups and classes (Group A, and Class 1 or Class 2) while assigning white employees to such positions.

(3) Employment of plaintiffs in higher seniority groups and classes (Group A, and Class 1 or Class 2) without according them seniority therein.

(4) Denial of promotion of plaintiffs to higher seniority groups and classes without criticism of their fitness and ability because they were negroes and for the purpose of oppressing them.

The charge against the Union was that the above acts were done by Railroad with Union's "connivance" [Tr. 2-17].

The Appellant's position is not entirely clear, but we now understand that Appellant has either expressly or

tacitly abandoned all of the allegations above noted except the first (Brief for Appellants, p. 12).

After the District Court had rendered its opinion upon the motions to dismiss the complaint and had ordered it dismissed, Appellant Hayes and a group of negroes consisting of substantially the same persons who are named in Exhibit A to the complaint moved for leave to file an amended complaint [Tr. 144]. Both causes of action in the proposed amended complaint were substantially the same as the original complaint except that the second cause of action alleged that when the agreement was entered into Union and Railroad had a verbal understanding, modifying the agreement, that the Railroad would assign negroes to lower seniority groups and classes (Group B and Classes 4 and 5) when first employed, whereas white persons would be assigned to higher seniority groups and classes (Group A and Classes 2 and 3) when first employed [Tr. 145-161]. The sole issue with respect to the proposed amended complaint is whether the District Court abused its discretion in denying leave to file it.

Summary of Argument.

I.

One of the principal grounds supporting the judgment of the District Court dismissing the complaint against the Railroad is that the Court did not have jurisdiction of the subject matter of the action. The sole ground of jurisdiction asserted by plaintiffs is that the action arose under a federal law regulating interstate commerce. In so far as the complaint charged the Railroad with failure to promote or accord plaintiffs seniority rights in accordance with the collective bargaining agreement, it was an action on contract and not one arising under federal law and hence not within the jurisdiction of the District Court.

II.

The complaint charged the Railroad with discrimination against the plaintiffs in assigning them to inferior seniority groups and classes at the time when first employed. It failed to state a cause of action arising under federal law because the Railway Labor Act does not either expressly or impliedly prohibit a railroad from discriminating against persons by reason of their race in employment.

III.

The allegation that Railroad committed the acts charged with the "connivance" of the Union is a charge that they were committed with the acquiescence of the Union. Thus the complaint charged the Railroad and Union with separate and distinct acts—the Railroad with the commission of certain wrongs and the Union with omitting to take counter measures to prevent the wrongs committed by Railroad. If this gave rise to a cause of action against

the Union cognizable by the District Court as one involving a federal question, the jurisdiction of the cause of action against the Union did not permit the Court to assume jurisdiction of the separate and distinct non-federal action against Railroad.

IV.

When the jurisdiction of a federal Court is placed in issue, the Court is not bound by the facts pleaded but may determine the true facts. The District Court did this by resorting to the affidavits filed by the parties. The evidence contained in the affidavits of the Railroad and Union which is not disputed by any competent evidence produced by Appellant, conclusively establishes that Railroad did not discriminate against the plaintiffs or other negroes in hiring or in application of the seniority and promotion rules of the agreement. This demonstrated that there was no federal question involved which would give the Court jurisdiction.

V.

The judgment of dismissal of the District Court was a dismissal on the merits as well as for lack of jurisdiction. The Appellees moved to dismiss for failure of the complaint to state a claim upon which relief could be granted. The Court considered the affidavits of the parties in considering the motions. Under Rule 12(b) the motions were treated as motions for summary judgment. The Court's finding that there was no issue as to any material fact is proper because the Appellant did not present competent evidence contradicting the material facts contained in the affidavits of Union and Railroad. Statements in affidavits which are based on hearsay or which are other-

wise incompetent do not create an issue as to a material fact which prevents the entry of a summary judgment. The undisputed facts in the affidavits of Railroad and Union that no discrimination had been practiced by either Appellee justified the District Court in rendering a judgment as a matter of law for the Appellees.

VI.

The judgment of dismissal is also proper because the plaintiffs have an adequate administration remedy which they must pursue to the exclusion of a Court action. The plaintiffs seek a judgment which will fix future seniority rights under the collective bargaining agreement. The United States Supreme Court has recently held in *Slocum v. D. L. & W. R. Co.*, 339 U. S. 239, that such a cause of action is exclusively within the jurisdiction of the Railroad Adjustment Board.

VII.

The order of the Court refusing to allow Appellant to file an amended complaint was proper. Such a motion is addressed to the discretion of the Court and the Court did not abuse its discretion. The only new allegation contained in the amended complaint is the allegation contained in the second cause of action that the Railroad discriminated against the plaintiffs by assigning them to inferior seniority groups and classes when first hired pursuant to a verbal agreement between Railroad and Union made when the collective bargaining agreement was made. On a motion to file an amended complaint the Court can consider facts other than those pleaded. The undisputed facts appearing in the affidavits considered by the Court show that Railroad has not discriminated be-

tween white persons and negroes in assignment of new employees to seniority groups and classes. The facts stated in the amended complaint are not true and are a fraud on the Court.

VIII.

The Court did not abuse its discretion in refusing Appellant permission to file the amended complaint because it does not state a cause of action against Railroad under the Railway Labor Act for two reasons.

First, the amended complaint merely alleges that the plaintiffs were assigned to inferior groups and classes when first hired. It does not allege that all negroes when first hired as cooks were assigned to inferior groups and classes. The plaintiffs are only some of the negroes who have been employed by Railroad. The facts in the affidavits show that many negroes when first hired were assigned to higher seniority groups and classes. Racial discrimination does not exist if some negroes are hired in inferior groups and others are hired in higher groups and classes.

Second, the right of the Railroad under the Railway Labor Act to discriminate against negroes in the matter of hiring is not extinguished because such right is recognized by the collective bargaining agent in an agreement. The freedom in hiring enjoyed by the Railroad under the Act cannot be made to depend on whether the collective bargaining agent approves or disapproves of the actions of the Railroad. Anything which the Railroad has the power to do alone it has the power to do even though the Union agrees to it. In the *Tunstall* case the Railroad and Union did something which neither

could do alone—destroy pre-existing seniority rights. The Court held that such action by the Union was invalid under the Act and hence the Railroad could not be bound by or enforce an agreement which the other party was prohibited from making. The case did not hold that the Railroad had violated the Act by making the agreement. Neither is such an agreement as is here alleged, a violation of the obligations of the Union under the Railway Labor Act. The agreement does not deprive any person of existing seniority rights as in the *Tunstall* case. If the Union made such an agreement, it merely recognized the right of the Railroad under the Act to hire such persons as it wished to and to classify them in such work categories as it thought desirable. Under the collective bargaining agreement, the employees so hired and classified by the Railroad were entitled to equal rights of seniority and promotion. The situation alleged in the amended complaint is no different from that in the *Tunstall* case with respect to the practice of the railroad there involved, undoubtedly recognized by the Union in the collective bargaining agreement, not to promote negro firemen to engineer status.

IX.

The relief sought in this case, both in the original and in the proposed amended complaint, shows that Appellant seeks the complete abolition of the separate seniority groups and classes provided by the agreement rather than the abolition of the alleged oral agreement between Union and Railroad. This the Court cannot do because it has no power to write a new contract for the parties.

ARGUMENT.

I.

An Action for Breach of Contract Does Not Present a Federal Question.

The Appellant has now apparently abandoned all charges against the Railroad set forth in the complaint except the allegation that at the time of their first employment the Railroad assigned plaintiffs to inferior seniority groups and classes while assigning white persons when first employed to higher seniority groups and classes. However, the complaint contains the allegations heretofore noted concerning the failure of the Railroad to promote the plaintiffs as required by the agreement. We will discuss these allegations so that our position will be clear in case we have misunderstood the position of the Appellant.

A controversy concerning the question of whether a collective bargaining agreement has been violated by the Railroad employer is not a controversy arising under the Railway Labor Act. The right of the plaintiffs in such a case is founded upon a contractual obligation and not upon any provision of the Railway Labor Act. The determination of such controversy can involve only a construction of the agreement and a determination of the factual question of whether the defendant Railroad has violated the provisions of the agreement. The determination of such controversy will not turn upon the construction of any provision of the Railway Labor Act and therefore, the controversy cannot be one arising under the laws of the United States. The Railway Labor Act does not compel the making of collective bargaining agreements. It encourages the making of such agreements by requiring collective bargaining and by freeing the collective bar-

gaining agent of the employees from employer domination. But the rights acquired by employees under a collective bargaining agreement voluntarily negotiated are not rights which arise under the Railway Labor Act. Instead, they are mere contractual rights which arise under the usual rules of contract.

The Courts have almost without exception held that an action upon a contract or for breach thereof, even though the contract is made pursuant to a federal statute, is not an action arising under the laws of United States. This is the holding of the leading case on the subject—*Gully v. First National Bank*, 299 U. S. 109. Consistently with the principle announced in this case, the federal Courts have held in a number of cases that suits by railroad employees against railroad employers based upon employment contracts, collective bargaining agreements, or contracts implied from long custom and practice, are not suits arising under the laws of the United States and that on that ground the federal Courts do not have jurisdiction of the subject matter of such suits.

Starke v. N. Y. C. & St. Louis R. R. (7th C. C. A.), 17 Labor Cases, par. 65,629;

Strawser v. Reading Co. (D. C., E. D., Penn.), 80 Fed. Supp. 455;

Malone v. Gardner (4th C. C. A.), 62 F. 2d 15;

Barnhardt v. Western Maryland Ry. Co. (4th C. C. A.), 128 F. 2d 709, cert. den. 317 U. S. 671, 87 L. Ed. 538;

Burke v. Union Pacific Railroad Co. (10th C. C. A.), 129 F. 2d 844;

Shipley v. Pittsburgh & L. E. R. Co. (D. C., W. D., Penn.), 70 Fed. Supp. 870;

Parrish v. Chesapeake & O. Ry. Co. (4th C. C. A.), 62 F. 2d 20, cert. den. 288 U. S. 604.

II.

Railway Labor Act Does Not Prohibit Racial Discrimination by Railroads.

In order for a District Court to have jurisdiction on the ground that the suit is one arising under a federal law regulating commerce, there must exist a genuine and present controversy with respect to the construction or effect of such a law, so that the rights claimed will be supported if the law is given one construction or effect and defeated if it receives another. If such a problem of construction is not involved or if the claim is obviously without merit, the action is not one arising under federal law and the District Court is without jurisdiction on that ground.

Gully v. First National Bank, 299 U. S. 109;

California Water Service v. Redding, 304 U. S. 252;

Williams v. Miller, 48 Fed. Supp. 277, affirmed 317 U. S. 599.

The claim of Appellant is that Railroad has discriminated against the plaintiffs by assigning them to inferior seniority groups and classes at the time of first employment, whereas white persons have been assigned to higher seniority groups and classes at the time of first employment. Railroad denies that this is a fact but we will discuss the allegation first on the assumption that it is true. Even though true, such action on the part of the Railroad clearly would not violate the provisions of the Railway Labor Act. Accordingly, no substantial federal ques-

tion exists upon which jurisdiction of the District Court can be founded.

The Railway Labor Act is not a Fair Employment Practices Act. It does not expressly or impliedly enjoin on a railroad any obligation with respect to the employment of negroes or their treatment after being employed. Neither does it undertake governmental regulation of wages, hours or working conditions nor interfere with the normal right of an employer to select its employees or discharge them, so long as the employer does not impair the collective bargaining process. The Act deals exclusively with the encouragement of collective bargaining, the mediation of labor disputes and the settlement of grievances under collective bargaining agreements.

Terminal R. R. Assn. v. Brotherhood of R. R.

Trainmen, 318 U. S. 1 at page 6, 87 L. Ed. 571;

Texas & N. O. R. Co. v. Brotherhood of Ry. &

Steamship Clerks, 281 U. S. 584, 74 L. Ed. 1034;

Virginia Ry. Co. v. System Federation, 300 U. S.

515, 81 L. Ed. 789 at page 806;

Beeler v. Chicago R. I. & P. Ry. Co., 169 F. 2d

557;

Switchmen's Union of N A. v. National Mediation

Board, 320 U. S. 297, 88 L. Ed. 61;

General Committee B. L. E. v. Southern P. Co.,

320 U. S. 338, 88 L. Ed. 85;

General Committee B. L. E. v. M. K. T. R. Co.,

320 U. S. 323, 88 L. Ed. 76.

The case of *Tunstall v. B of L F & E*, 323 U. S. 210, 89 L. Ed. 187, and its companion case, *Steele v. L & N R Co.*, 323 U. S. 192, 89 L. Ed. 173, do not change the law announced in the foregoing decisions. The latter cases do not hold that the Railway Labor Act, either expressly or impliedly, prohibits a railroad from discriminating against negroes either at the time of first employment or in their treatment thereafter. The cases do hold that there is an implied obligation on the part of the collective bargaining agent of the employees of a railroad, derived from its power to exclusively bargain for such employees, not to discriminate against any employee represented by such bargaining agent by reason of the race of such employee. In these cases the railroads involved had been coerced by the collective bargaining agent into making an agreement which deprived negro firemen of seniority rights which they had previously acquired under previous collective bargaining agreements. The railroads as well as the collective bargaining agent were parties to the actions. The *Steele* case held that the railroad there involved was not bound by or entitled to take the benefit of a contract which the bargaining representative was prohibited by a statute from making. This holding is sound contractual law. Neither of the cases, however, is authority for the proposition that the Railway Labor Act imposes any obligation on a railroad to refrain from racial discrimination in employment practices. In the *Tunstall* case, the railroad concerned indulged in a type of racial discrimination which the Court

did not enjoin and which we submit, it had no power to enjoin. The facts appear in the decisions of the District Court and Circuit Court of Appeals who considered the case on the merits after the Supreme Court had passed on the jurisdictional question. (See *Tunstall v. B of L F & E*, 69 F. Supp. 826, affirmed 163 F. 2d 289, cert. den. 332 U. S. 841.) It appeared in these decisions that the railroad involved had a fixed practice not to promote negro firemen to the status of engineers. The collective bargaining agreements designated negro firemen as "non-promotable" and white firemen as "promotable." The seniority which the negro firemen owned had been acquired under these agreements. It is thus evident that the collective bargaining agent had assented to a discriminatory practice of the railroad. But the Court did not enjoin this agreement nor the discriminatory practice of non-promotability of negro firemen. The Court did enjoin later agreements which sought to deprive the negro firemen of their seniority as firemen. The effect of the Court's decision was to reinstate the earlier agreements under which the negro firemen held seniority rights but which undoubtedly discriminated against them by designating them as non-promotable.

III.

Causes of Action Against Railroad and Union Are Separate and Distinct.

We do not propose to discuss the question of whether the complaint states a cause of action against the Union except to point out that any cause of action which the complaint purports to state against the Union is separate and distinct from the cause of action against the Railroad and that if there is jurisdiction of the cause of action against the Union, this fact does not support the claim of jurisdiction against the Railroad. In the complaint the Railroad is accused of being the active wrong-doer. The only charge against the Union is that the alleged wrongs committed by the Railroad were with the Union's "connivance." The word "connivance" means "intentional failure or forbearance to discover a wrongdoing; voluntary oversight; passive consent or cooperation" and in law "corrupt or guilty assent to wrongdoing, not involving actual participation in it, but knowledge of, and failure to prevent or oppose it." *Webster's International Dictionary*; see also *Brandon v. Holman* (C. C. A. 4th), 41 F. 2d 586.

In short, the only charge against the defendant Union is that it has sat by and done nothing about the Railroad's allegedly wrongful conduct.

If any cause of action is stated against the Railroad, it is because of the act of the Railroad in assigning employees to inferior seniority groups and classes when first

employed or in failing to live up to the terms of the agreement in the matter of promotion. The Union is merely charged with failure to take some counter move to prevent the action of the Railroad.

The acts charged against each defendant are not joint or common but are separate and distinct. Jurisdiction over a claim against one defendant by virtue of a federal matter will not support jurisdiction over a separate claim against another defendant.

3 *Moore's Federal Practice* 2d 2725;

Pearce v. Penn. R. Co. (3rd C. C. A. 1927), 162 F. 2d 524;

Wasserman v. Perugini (2d C. C. A. 1949), 173 F. 2d 305;

Bullock v. U. S. (D. C. D. N. J. 1947), 72 F. Supp. 445;

New Orleans Public Belt R. Co. v. Wallace (5th C. C. A. 1949), 173 F. 2d 145;

Sheaf v. Minn. S. L. R. Co., 162 F. 2d 110;

Musher Foundation v. Alba Trading Co. (2d C. C. A. 1942), 127 F. 2d 9, certiorari denied 317 U. S. 642, 87 L. Ed. 517;

Norris v. Mayor of Baltimore (D. C. D. Md., 1948), 78 F. Supp. 451.

IV.

Facts Disclosed by Affidavits Show Court Is Without Jurisdiction.

In stressing the point that the Railroad Labor Act does not prohibit a railroad from discriminating against negroes if it desires, we do not want to be understood to be defending racial discrimination. We are merely stating the law as it exists. No employer could have a better record of fair treatment of negroes than that of the Railroad in the instant case. The evidence is overwhelming that no discrimination against negroes in the cook's craft has been practiced by Railroad under the agreement or otherwise.

The complete answer to any theory which the Appellant can advance to support the jurisdiction of the District Court is that under the facts there has been no discrimination by the Railroad in assigning negroes to seniority groups and classes when first hired or in the promotion of such persons to higher groups and classes. It is obvious that if no discrimination exists, there is no federal question in the case. This is conceded by Appellant's counsel [Tr. 173-4].

By its motion to dismiss in the District Court, the Railroad put in issue the jurisdiction of the Court. A motion to dismiss for lack of jurisdiction which controverts the jurisdictional averments of the complaint and which is supported by affidavits creating an issue of fact is an appropriate method of challenging the jurisdictional allegations of the complaint. Such a motion does not admit the truth of the allegations in the complaint and requires the Court to inquire into the facts determining its jurisdiction before considering the merits of the complaint. If, when such an issue is created, the plaintiff upon whom rests

the burden of proof fails to support his jurisdictional averments by sufficient proof, the case will be dismissed for lack of jurisdiction. When such an issue is made, the trial court is not bound by the pleadings of the parties but may inquire into the facts as they really exist.

McNutt v. General Motors Acceptance Corp., 298 U. S. 178, 80 L. Ed. 1135;

K. V. O. S. v. Associated, 299 U. S. 269, 81 L. Ed. 183;

Allen v. Clark (D. C. Calif.), 22 F. Supp. 898;

Spears v. Spears (6th C. C. A. 1947), 162 F. 2d 345;

Schuckman v. Rubenstein (6th C. C. A. 1947), 164 F. 2d 952;

Calhoun v. Lang, 40 F. Supp. 264.

Under Rule 43(e) the District Court can decide such a factual issue presented by a motion on affidavits alone.

Young v. Garrett (8th C. C. A. 1945), 149 F. 2d 223;

Urquhart v. American-La France Foamite Corp., 144 F. 2d 542, cert. den. 323 U. S. 783, 89 L. Ed. 625;

American Ins. Co. v. Bradley Mining Co. (D. C. Calif. 1944), 57 F. Supp. 545.

Under this rule there is no reason why a Court may not determine the credibility to be given conflicting affidavits the same as when considering oral testimony. Therefore in passing upon a factual dispute affecting jurisdiction, the Court is not bound by the limitation applying on motions for summary judgment that judgment may not be entered if there is an issue as to a material fact. We

do not think that there was any issue of a material fact raised by the affidavits considered by the District Court. If there was such an issue material to the jurisdictional question, it was resolved by the judgment in favor of the Appellees.

Even if the District Court had not resolved the factual issue material to the jurisdictional question, this Circuit Court of Appeals can determine the issue from the affidavits in the record if such an issue exists. The jurisdictional question can be determined at any stage of the proceedings, and the authority of an Appellate Court to determine jurisdiction, and all factual questions pertinent thereto which can be determined from the record before it, is not less broad than that of the trial court.

The affidavits filed by the Railroad, which are uncontradicted as to material matters by any competent evidence contained in the affidavits filed by Appellant, show overwhelmingly that Railroad has not alone, or in connivance with the Union, discriminated against negroes in favor of white persons either at the time of original hiring or in the matter of promotion thereafter. The affidavits filed by the Railroad were made by H. A. Hansen, Manager, H. I. Norris, Assistant Manager, and J. Hansink, Superintendent of the Dining Car and Hotel Department of Railroad—men who were the chief executive officers of that department, who were shown to have personal knowledge of the facts stated in their affidavits, and who had available to them the employment records of all persons who have worked in the cook's craft for Railroad [Tr. 17, 43, 80, 110, 111]. It was necessary for Railroad to file a succession of affidavits to clearly controvert the many reckless statements and denials contained in the affidavits filed by Appellant. The only affidavits filed by Appellant were

those made by Thomas E. Hayes [Tr. 60, 102]. No affidavits were made by the other plaintiffs or by any of the other numerous negro cooks whose names were listed in the affidavits of Railroad. The affidavits of Thomas E. Hayes are incompetent and should be disregarded because they were made by a person who has not shown himself to have personal knowledge of the employment records of the several hundred white and colored cooks employed by Railroad as to whose employment experience Hayes' statements are pure hearsay. They also contain large quantities of argument and mere denials of factual statements in Railroad's affidavits, which argument and denials have no evidentiary value. His affidavits distort the plain meaning of statements contained in affidavits of Railroad, contain many reckless charges and are patently untrustworthy. Although his affidavits contain repeated accusations that Railroad has refused to promote or allow negroes to bid on jobs in higher seniority groups and classes, and has employed negroes in higher groups and classes for long periods without according them seniority therein, his counsel has now abandoned these false charges and now contends that the discrimination practiced by Railroad is in the assignment of negroes to Group B seniority status at the time they are originally hired. In its affidavits the Railroad has furnished the names and seniority dates of 318 negroes out of 583 who acquired seniority in Group A, or higher, when first hired. This evidence stands uncontradicted.

The claim of discrimination made by Appellant is wholly unsupported factually, and being plainly without merit, does not present a federal question under any view which Appellant has advanced with respect to the obligations of Union and Railroad under the Railway Labor Act.

V.

**The Judgment of Dismissal Was Proper Summary
Judgment for Appellees.**

In the District Court both Appellees moved to dismiss the action because the complaint failed to state a claim upon which relief could be granted. The Court considered the affidavits submitted by Appellant and Appellees and in its judgment of dismissal determined that there was no genuine issue as to any material fact and that the Appellees were entitled to a judgment of dismissal as a matter of law. Under Rule 12(b) where affidavits are considered by the Court upon such a motion, the motion may be treated as one for summary judgment and disposed of as provided in Rule 56. The summary judgment was proper because a consideration of the affidavits of all parties shows that there is no genuine issue as to any material fact. We have already discussed the fact that the affidavits of Thomas E. Hayes are incompetent because on material matters they consist entirely of hearsay, argument and mere denials without evidentiary value. Such affidavits do not create an issue as to material fact which prevents the granting of a summary judgment for Appellees.

Piantadosi v. Loews, Inc. (9th C. C. A.), 137 F.
2d 534 (mere denials);

Boerner v. U. S., 26 F. Supp. 769 (hearsay).

VI.

**Railroad Adjustment Board Has Exclusive Jurisdiction
of This Controversy.**

The Railroad moved to dismiss the complaint on the ground that the Appellant had an administrative remedy under the Railway Labor Act which should be resorted to in lieu of seeking relief in Court.

The District Court did not pass upon this contention but its judgment of dismissal is justified, if for no other reason, by the fact that the Railroad Adjustment Board has exclusive jurisdiction of the type of controversy which is here presented if any justiciable controversy at all is presented. This is a reason which could be urged in support of the judgment even though it had not been urged in the District Court as it was in this case.

Marshall v. Pletz, 317 U. S. 383, 87 L. Ed. 348;

Cold Metal Process v. McLouth Steel Corp., 126 F. 2d 185;

Crummer v. Nuveen, 147 F. 2d 3;

Ross v. Comm. of Int. Revenue, 169 F. 2d 483.

The Appellant Hayes and most of the persons who are listed on Exhibit A attached to the complaint are employees of Railroad. They seek an adjudication which will govern their rights in the future. If Appellant Hayes still relies upon the allegations contained in the complaint that Railroad has failed to accord to the plaintiffs seniority in accordance with the provisions of the Agreement or to promote them to higher groups and classes in accordance

with the provisions thereof, it is obvious that the case will involve an interpretation by the Court of the terms of the agreement in order to determine the obligation assumed by the Railroad under the said agreement. In so far as the complaint charges the Railroad with wrongfully assigning Appellant and such persons to inferior seniority groups and classifications, it is likewise obvious that the complaint seeks a change in the seniority and promotion provisions of the agreement.

One of the principal items of relief prayed for is that the rights of the Appellant and such persons be declared and that an order be made according such persons "such seniority dates and such class or classes and group or groups as they would have been entitled to had there been no discrimination against them by defendant." If the Appellant were granted the relief which he seeks, all of such persons would be accorded seniority dates in Group A and the higher classes as of the date each acquired seniority in any class in Group B. This in effect would abolish the distinction made by the collective bargaining agreement between Group B and Group A.

Since the judgment of dismissal in this case the United States Supreme Court had decided the cases of *Slocum v. D. L. & W. R. Co.*, 339 U. S. 239, 94 L. Ed. 534 and *O. R. C. v. Southern Railway Co.*, 94 L. Ed. 542, which definitely hold that the Railroad Adjustment Board has jurisdiction, to the exclusion of a Court, of grievances or other disputes under collective bargaining agreements which involve the future application of such agreements.

These cases clarify the Court's former holding in the case of *Moore v. Ill. Central R. Co.*, 312 U. S. 630. It was held in that case that a discharged railroad employee who accepted a discharge as terminating his employment could sue in Court to recover damages for wrongful discharge. It is plain from the ruling of the Supreme Court in the *Slocum* case that a Court has concurrent jurisdiction with the Railroad Adjustment Board in actions involving collective bargaining agreements only where the controversy, as in the *Moore* case, does not involve the future application of such agreements.

The decision in the *Slocum* case strengthens the holding of the United States Supreme Court in the case of *O. R. C. v. Pitney*, 326 U. S. 561, 90 L. Ed. 318, rehearing denied 327 U. S. 814, 90 L. Ed. 1038, which held that the Railroad Adjustment Board had jurisdiction, to the exclusion of federal courts, of controversies involving the construction of collective bargaining agreement negotiated under the provisions of the Railway Labor Act. Although the *Pitney* case had not clearly distinguished between the rule which it announced and the rule announced in the *Moore* case, it had been followed in the following cases:

Ill. Central R. Co. v. B. of R. T., 83 F. Supp. 930;

M. K. T. v. Randolph, 164 F. 2d 4, cert. den. 334 U. S. 818;

Hampton v. Thompson (5th C. C. A. 1948), 171 F. 2d 535;

Order of RR Telegraphers v. N. O. Tex. & Mex. Ry., 156 F. 2d 1;

Johnson v. War Assets Administration, 171 F. 2d 556.

The *Slocum* and its companion case remove all doubt that the federal courts which have followed the *Pitney* case have been following the proper course.

We are not contending that the *Slocum* case overrules the *Steele* or *Tunstall* cases upon which the Appellant relies. The *Slocum* case does not have application in a situation where the *Steele* and *Tunstall* cases apply, but as we have noted elsewhere in this brief the latter cases have no application here. Courts do have jurisdiction to set aside agreements which are plainly unlawful under the Railway Labor Act. But they do not have jurisdiction to construe them where future application is involved, or to establish under an agreement seniority rights which have never previously existed. This is what the plaintiffs seek. If any justiciable controversy is presented (which we will later see is not the case) it is one exclusively within the jurisdiction of the Railway Adjustment Board.

VII.

The Court Properly Denied Leave to File Amended Complaint Because It Is a Sham.

After the District Court had filed its opinion ordering the complaint to be dismissed but before judgment of dismissal was entered, Appellant Hayes moved for leave to file an amended complaint containing two causes of action, the first of which is substantially the same as the original complaint. The second cause of action in the amended complaint realleged most of the allegations contained in the first cause of action and in addition, alleged in substance that the Railroad and the Union had made a verbal agreement at the time the collective bargaining agreement was entered into, that the Railroad would assign negroes to lower seniority groups and classes at the time of original hiring, whereas, white men would be assigned to higher seniority groups and classes when first hired. No showing in support of the motion to file the amended complaint was made by Appellant except the affidavits which had already been considered by the Court in passing upon the motions to dismiss the original complaint. The District Court denied leave to file the amended complaint.

A motion to file an amended complaint is addressed to the discretion of the trial court and the ruling of the trial court will not be reversed except upon a showing of abuse of discretion.

C. E. Stevens Co. v. Foster & Kleiser Co. (C. C. A. 9th), 109 F. 2d 764, 768-9, reversed on other grounds 311 U. S. 255.

It is not an abuse of discretion on the part of the trial court to refuse to allow an amendment to a pleading where the amendment is not offered in good faith, *Kuris v. Pepper Poultry Co.* (I. D. N. Y.), 2 F. R. D. 361, where the amended pleading is insufficient to state a cause of action, *Beechwood Securities Corporation v. Associated Oil Co.* (9th C. C. A.), 104 F. 2d 537, 540; *Welch v. T. W. Warner Co.* (D. C. S. D. N. Y.), 47 F. 2d 231-2, or where, although the amended complaint states a cause of action on its face, it is subject to summary dismissal under Rule 56 the same as the original complaint.

U. S. ex rel. Brensilber v. Bausch & Lomb Optical Co. (2nd C. C. A.), 131 F. 2d 545.

It is quite apparent that the proposed amended complaint is a sham and was not proposed in good faith. It is an obvious attempt on the part of Appellant Hayes to avoid the consequences of the opinion of the District Court and to stay in Court regardless of the facts which have been established of record. The added material in the proposed amended complaint alleges a verbal understanding between Union and Railroad that Railroad will discriminate against negroes in seniority assignment when first hired for the purpose of attempting to bring the case within the rule of the *Tunstall* and *Steele* cases. This has been done in the face of the uncontradicted evidence already referred to that Railroad has assigned large numbers of negroes seniority status in Group A when first hired and has assigned white men to Group B seniority status when first

hired. The actual results of the employment practices conclusively demonstrate that no such verbal understanding could have been made or followed. In almost all seniority groups and classes negroes are in the majority.

If the present tendency continues negroes will become even more predominant than at present. Both white and negro cooks are generally first hired in the lower groups and classes to fill the vacancies created by the promotion of white and colored cooks. More negro cooks are being hired than white cooks. This is indicated by the relative number of each race found in the lower groups and classes. The inevitable result is that negroes will become increasingly dominant as they are moved into the higher groups and classes where, at present, as already noted, they are in most cases in the majority. These facts which are inescapable plainly indicate that leave to file the amended complaint was properly denied not only on the ground that it is a sham complaint not proposed in good faith, but also because it, like the original complaint, is subject to summary dismissal under Rule 56.

VIII.

**Proposed Amended Complaint Did Not State Claim
Upon Which Relief Could Be Granted.**

As has already been noted, it is not an abuse of discretion to refuse leave to file an amended complaint which does not state a cause of action. The first cause of action in the proposed amended complaint does not contain allegations presenting any problem different from that presented by the original complaint. The second cause of action repeats in substance, with slight variation, the allegations of the original complaint and, in addition, alleges that at the time the written agreement was entered into Union and Railroad had a verbal understanding that Railroad would discriminate against negroes by assigning them to lower seniority groups and classes when first hired, whereas, white men when first hired would be assigned to higher groups and classes. It further alleges that the persons designated as plaintiffs in the proposed amended complaint were, pursuant to this verbal understanding, assigned by Railroad to lower seniority groups and classes than white men when first hired.

The second cause of action fails to state a claim upon which relief can be granted for two reasons. First, because it does not allege that the Railroad has discriminated against all negroes in the assignment of seniority when first employed and second, the right of the Railroad under the Railway Labor Act to assign negroes to any class of service or seniority group when first hired is not changed by reason of the fact that the collective bargaining agent

recognizes this right in the collective bargaining agreement.

The second cause of action merely alleges that the plaintiffs when first hired were assigned by the Railroad, pursuant to the verbal understanding, to lower seniority groups and classes, whereas, white persons when first employed were assigned to higher seniority groups and classes. It does not allege that all negroes when first hired as cooks by Railroad were assigned to lower seniority groups and classes. It could not truthfully so allege because, as heretofore pointed out, the Record herein lists without contradiction the names and dates upon which 318 negroes were assigned to seniority Group A or higher when first employed.

A complaint which fails to allege that a railroad has assigned all negroes hired by it to lower seniority groups and classes when first employed fails to state a cause of racial discrimination. The collective bargaining agreement provides for separate and distinct seniority groups and classes. It cannot be said that discrimination by reason of race exists because a Railroad hires some negroes in a lower group and other negroes in a higher group. It can hardly be contended that a Railroad must hire all negroes in the highest seniority group to avoid a charge of discrimination.

The second reason why the second cause of action fails to state a claim for relief is even more fundamental than the reason just discussed. It is to be noted that, if a verbal understanding was had by Union and Railroad at the time

alleged, the verbal understanding was one which would be unenforceable by the Union against the Railroad for several reasons. It is the policy of the Railway Labor Act as well as the National Labor Relations Act that collective bargaining agreements shall be in writing.

Shipley v. Pittsburgh & L E R Co. (D. C. W. D. Penna. 1949), 83 Fed. Supp. 722, 741 (Railway Labor Act);

O. R. T. v. Railway Express Agency, 321 U. S. 342-9, 88 L. Ed. 788.

The verbal understanding was alleged to have been had when the written agreement was made on June 1, 1942, and to have governed the employment practices of the Railroad since then. Such a verbal agreement is one which by its terms is not to be performed within a year from the making thereof. Therefore it is invalid under the Statute of Frauds and unenforceable against either party thereto.

California Civil Code, Paragraph 1624.

Furthermore, the verbal understanding alleged to have been made would violate the parol evidence rule against permitting the terms of a written contract, complete in itself, to be varied by prior or contemporaneous parol agreements.

Shipley v. Pittsburgh & L E R Co. (D. C. W. D. Penna. 1949), 83 Fed. Supp. 722;

American Sumatra Tobacco Co. v. Willis, 170 F. 2d 215.

Consequently, if a verbal agreement such as that alleged was made, it would be unenforceable against Railroad. Any

action taken thereunder would be a purely voluntary action on the part of the Railroad which it would be entitled to take under the provisions of the Railway Labor Act.

Furthermore, even if the verbal agreement can be said to have binding effect as between the parties, it is not an agreement which would create a violation of the Railway Labor Act by either the Railroad or the Union. We have already seen that the Railway Labor Act is not a Fair Employment Practices Act. Under it a railroad is not prohibited from discriminating against negroes in their original hiring or in their treatment after hiring if it wishes to do so. The freedom which a railroad enjoys in the hiring of employees under the Act cannot be taken from the railroad by reason of the attitude of the collective bargaining agent. The right of the railroad to refuse entirely to hire negro employees or to assign them to less desirable classes of services when they are hired is not contingent upon the approval or disapproval of the collective bargain agent. Therefore, the fact that a collective bargaining agreement between a collective bargaining agent and railroad recognizes the right of the railroad to indulge in a discriminatory practice does not make the conduct of the railroad unlawful. Anything which a railroad has the power to do under the Act alone, it has the power to do even though the bargaining agent agrees to it. The *Tunstall* and *Steele* cases do not hold otherwise. They do not hold that a railroad has any obligation under the Railway Labor Act to refrain from racial discrimination. They merely define the rights and obligations of a collective bargaining agent under the Railway Labor Act and further hold as a matter of contract law that a railroad cannot enjoy the benefits of or be bound by an agreement between

the railroad and a collective bargaining agent which the collective bargaining agent is prohibited from making.

On superficial consideration it may appear that even though such an agreement would not be prohibited to a railroad, it would be one which it would be unlawful for the collective bargaining agent to make. However, we do not think such is the case. The *Tunstall* and *Steele* cases did not so hold and the policy of the Railway Labor Act does not require such a result. The Railway Labor Act encourages collective bargaining, and as we have seen, requires the bargaining parties to reduce to writing the matters upon which they have agreed. In such a legal environment a railroad and a collective bargaining agent reach an agreement on the wages, working conditions, and seniority rules applicable to a craft, except that the railroad is unwilling to agree to employ negroes in certain work classifications within the craft. The railroad assumes this position because of reasons which it considers entirely valid and for the good of its service. Under the Act the railroad would have a legal right to assume such an attitude. Under such circumstances, it would not be possible to incorporate in the collective bargaining agreement the seniority rules applicable to the different work classifications without giving recognition to the fact that in certain classifications negroes could acquire seniority and in others that they could not. If it is unlawful for the collective bargaining agent to make such an agreement recognizing the position which the railroad insists upon assuming, the purpose of the Act to encourage collective agreements is frustrated and negro members of the craft are not benefited because the railroad remains free to continue its practice of segregation. We do not think the policy of the Act makes it unlawful for the collective bar-

gaining agent to avoid such a deadlock by recognizing in the agreement the right which the railroad has under the Act to retain freedom in its hiring policies. Again we repeat that no such agreement as we have been discussing has been made by the Railroad and Union in this case, in spite of the fact that they were free to do so under the law.

The rule announced in the *Tunstall* and *Steele* cases must be determined in the light of the factual situation there existing. When they are read in this light, we do not think they declare it unlawful for a collective bargaining agent to make an agreement with a railroad which recognizes employment practices which a railroad has a right to indulge in under the law, so long as the bargaining agent does not make an agreement which is *destructive* of *existing rights* of the negroes in the craft. We do not mean to say that the bargaining agent should not bargain for racial equality, but we do say that it is not unlawful for the agent to be unsuccessful in changing the discriminatory practices which a railroad may desire to continue.

It appears in the *Tunstall* case (as reported when considered on the merits in 163 F. 2d 289) that the railroad there involved had a practice not to promote negro firemen to engineer status. This practice which was recognized must have been recognized in the collective bargaining agreements under which white and negro firemen acquired seniority. Otherwise, their relative rights to promotion could not have been determined. The situation as to negro firemen under the existing seniority agreement was described as follows at page 291:

“No railway company of the United States has ever employed a Negro as a locomotive engineer and the Negro firemen are recognized as non-promotable to that position. Other firemen, if they possess the

requisite mental and physical qualifications, are given opportunity to stand examinations for promotion to engineer, but not Negro firemen; and, because they are not promoted, Negroes serve for long periods as firemen and the seniority thus acquired enables them to obtain some of the best paid and most desirable runs in the company's service."

The bargaining agent succeeded in obtaining a new agreement from the railroad there involved that all new runs and vacancies would be filled by promotable firemen. As a result of this provision, negro firemen were deprived of desirable runs which they would have been entitled to by seniority acquired under the former agreement which had to be changed by the new agreement. The Court said:

"The fact that the railroads have discriminated against Negroes in the matter of promotability, does not justify the Brotherhood, which represents them as bargaining agent, in making a further discrimination based on that discrimination. Because the railroads do not permit Negroes to hold the position of engineer, is no reason why a bargaining agent representing them should use its bargaining power to deprive them of desirable positions as firemen which the railroads do permit them to hold."

The Court did not declare unlawful the practice of non-promotability of negro firemen, but it enjoined the operation of the new agreement which had destroyed their existing seniority rights. The result of the judgment was to restore to effectiveness the earlier agreement which

undoubtedly recognized the discriminatory practice of refusing to promote negro firemen to the status of engineers.

The verbal understanding which Appellant Hayes alleges exists between Railroad and Union here, but of which there is no evidence in the Record, is similar to the agreement which was restored to effectiveness by the decision in the *Tunstall* case. Although we deny that such an understanding exists, we submit that it would not be unlawful for either Union or Railroad to make it if they chose to. That fact is an added reason why the District Court did not abuse its discretion in refusing leave to file the amended complaint.

No Justiciable Controversy.

The final and conclusive reason why the District Court properly dismissed the complaint and refused leave to file the amended complaint is that neither complaint presented a justiciable controversy with respect to which the Court had power to grant relief. The plaintiffs are not seeking the restoration of previously existing seniority rights which have been taken from them by an unlawful agreement, and which rights could be restored by the simple process of invalidating the unlawful agreement, if one existed. A judgment which would enjoin the Union from "conniving" with the Railroad as alleged in the original complaint or enjoin the operation of the verbal understanding alleged in the proposed amended complaint, would be futile and would not afford the plaintiffs the relief they seek. Such a judgment would not prevent the Railroad,

if it had been discriminating against the plaintiffs, from continuing such discrimination. In order to afford the plaintiff the relief which they seek for the future and the damages which they seek for past alleged wrongs, the Court would be required to fix a seniority date for each of them in a higher group, such as Group A, at some time earlier than the date therein that each now possesses. It is quite apparent that the seniority dates which they ask to have established for application in Group A are the seniority dates which each acquired by actual service in Group B. Such a judgment would adversely affect the seniority rights of white cooks and other colored cooks who hold older seniority rights in Group A than the plaintiffs. Such a reshuffling of the seniority rights of the entire craft would not arise from any contract between the Railroad and its employees but only as the result of legal compulsion. Wherein is found the authority of a Court to make such a decree? A decree of such a character would find no support in the Railway Labor Act and would be contrary to all recognized legal principles. Such a decree would in effect be a rewriting of the agreement between the Railroad and Union and would abolish the group seniority system provided for therein. That this is what the plaintiffs seek is apparent from the prayers in both complaints and from the written demands which Appellant Hayes has made upon the Chairman of the Union for abolition of group seniority.

Under the Railway Labor Act the majority of a craft are entitled to select the exclusive bargaining agent for

the craft and the membership of the craft is bound by the agreements made on their behalf by their bargaining agent. There is no provision in the Act under which a minority group in a craft can compel, either by administrative or Court proceeding, a railroad and a collective bargaining agent to make a contract containing prescribed terms. The Act simply does not provide machinery to accomplish any such result. A suit in Federal Court to accomplish such a result presents no justiciable controversy of which the Court has jurisdiction.

B. of R. T. v. T. & P. Ry. Co. (5th C. C. A.),
159 F. 2d 822;

Division 525, O R. C. v. Gorman (8th C. C. A.),
133 F. 2d 273;

Harris v. Missouri Pacific R. R. Co., 1 Fed.
Supp. 946.

While a Court can strike down illegal agreements and enforce and interpret contracts, it cannot make a new contract for the parties.

Shipley v. Pittsburgh & L E R Co. (D. C., W. D.,
Penn., 1949), 83 Fed. Supp. 722.

The only way in which the plaintiffs can appropriately seek the abolition of the group seniority system is through the collective bargaining process because in the absence of unlawful discrimination by the collective bargaining agent, a Court will not disturb the agreement of the employer and authorized bargaining agent.

Langhurst v. Pittsburgh & L E R Co. (Penna.),
17 Labor Cases, par. 65,314.

Conclusion.

We respectfully submit that the District Court did not err in dismissing the complaint or in refusing leave to file the amended complaint.

T. W. BOCKES,

W. R. ROUSE,

ELMER COLLINS,

JAMES A. WILCOX,

1416 Dodge Street, Omaha, Neb.,

E. E. BENNETT,

EDWARD C. RENWICK,

MALCOLM DAVIS,

W. J. SCHALL,

422 West Sixth Street, Los Angeles,

By E. E. BENNETT,

Attorneys for Appellee Union Pacific Railroad Company.

No. 12,509

IN THE

United States Court of Appeals
For the Ninth Circuit

THOMAS E. HAYES, et al., on Behalf of
Himself and All Others Similarly
Situated,

Appellants,

vs.

UNION PACIFIC RAILROAD Co. (a corpo-
ration) and DINING CAR EMPLOYEES
UNION LOCAL 372 (a voluntary un-
incorporated labor organization);
and JAMES G. BARKDOLL, as District
Director of said Local 372 in the
District of Los Angeles, State of
California,

Appellees.

CLOSING BRIEF FOR APPELLANTS.

HAROLD M. SAWYER,

240 Montgomery Street, San Francisco 4, California,

Solicitor for Appellants.

ARCHIBALD BROMSEN,

450 Seventh Avenue, New York 1, New York,

GLADSTEIN, ANDERSEN, RESNER & LEONARD,

240 Montgomery Street, San Francisco 4, California,

Of Counsel.

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PAUL F. O'BRIEN

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District of Los Angeles, State of
California,

Appellees.

CLOSING BRIEF FOR APPELLANTS.

INTRODUCTION.

There have been filed in this case a brief for appellee Dining Car Employees Union Local 372 (hereinafter referred to simply as "Union") and also one for appellee Union Pacific Railroad Company (here-

inafter referred to simply as "Railroad"). The first major portion of this closing brief for appellants will deal primarily with the positions advanced by Railroad. In many respects the reply to Railroad will also be a reply to Union, but where this is not the case a specific reply will be made to the latter. We shall not repeat arguments already made in our opening brief but where specific reference to any argument made in that brief is required for the sake of emphasis or otherwise, reference will be to designated pages, sections or paragraphs of the brief.

**COMMENTS ON RAILROAD'S STATEMENT
OF THE CASE.**

(A) Motions involved.

We agree that when the Court below dismissed the complaint and refused to permit the filing of the amended complaint on the ground of lack of jurisdiction, the Court meant that it lacked jurisdiction of the subject matter of the action since it was, in its opinion, not a civil action arising under any act of Congress regulating commerce, and specifically did not arise under the Railway Labor Act. It is said in Railroad's brief (page 2) that "On motion of the appellees the District Court dismissed the original complaint for lack of jurisdiction and also for failure to state a claim upon which relief could be claimed. In passing upon the latter ground the Court considered the affidavits presented by all parties and determined that there was no genuine issue as to any material fact."

The only document bearing upon this situation which the Court itself prepared is its opinion and order. (Tr. 136-144.) In this opinion there is not one single reference to the affidavits nor is there any discussion of whether or not a genuine issue existed as to any material fact. On the contrary, the opinion says:

“At most the complaint, in its original and amended form, alleges a violation of provisions of the Agreement. Any right of action, if one exists, is based on the alleged breach of the Agreement and does not arise under the Railway Labor Act, but only from the consequent contractual relations of the parties. (Citing cases.) Since this is not an action arising out of any act of Congress regulating commerce, the Court has no jurisdiction under 28 U.S.C. § 1337. Nor have the petitioners alleged facts facts necessary to give the Court Jurisdiction under the diversity of citizenship provision, 28 U.S.C. § 1332. *The question of jurisdiction* being decisive, it is not necessary to consider the other motions and respondents’ motion to dismiss the action must be granted. It is so ordered.” (Emphasis added.)

There was no consideration whatsoever by the Court of the question whether or not a genuine issue as to any material fact existed and consequently the order dismissing the complaint cannot be considered as a summary judgment in favor of Railroad and Union. (F.C.R. 56 (c).)

(B) Factual background.

Under this heading Railroad insists, notwithstanding the record, that the Court considered and passed upon the facts disclosed by the affidavits. In view of the fact that the Court based its order solely upon the jurisdictional issue to be determined and which it determined exclusively in the light of the complaint and proposed amended complaint, we did not in our designation of record include any of the affidavits, whether submitted by the appellants or by Railroad and Union. They were no part of the record necessary to a determination by this Court of the correctness of the ruling of the Court below. Furthermore, as will shortly be shown, the affidavits submitted by Railroad and Union contained so many demonstrably false statements of fact and so much misleading statistical material that we considered them of little value. Reference, however, will be made to these affidavits for the purpose of demonstrating their misleading character.

The analysis of the material provisions of the agreement concerning seniority (Railroad Br. pp. 2, 3, 4 and 5 lines on p. 5) are substantially correct but the conclusions drawn from this analysis are directly opposed to the allegations of the complaint. It is alleged in both the complaint and the proposed amended complaint that every one of the appellants was, solely because he was a negro and not for any other reason or consideration involving skill, capacity or experience, when first employed assigned arbitrarily a seniority date in Group B, whereas white persons when first employed in comparable positions were arbitrarily and

without consideration of anything but the fact that they were white, assigned seniority dates in Group A. *This allegation has never been contradicted* in any affidavit submitted on behalf of Railroad or Union, although attempts have been made to mislead the Court into thinking that there was no discrimination practiced against the negro appellants at the time of their initial employment.

The affidavit of Steven R. Auguston, verified September 14, 1949 (Tr. 25-29) at page 28 of the transcript alleges as follows:

“At all times mentioned in the complaint the promotion and assignment of employees to positions in higher seniority groups has been governed by said agreement regardless of race. It is false and untrue that plaintiff and other negroes have been assigned to seniority Group B and the third seniority class and to lower seniority groups and classes, and have been denied seniority in Group A and in the first and second seniority classes.”

Attached to this affidavit is an exhibit purporting to give the name, position and Group A seniority date of the appellants. (Tr. 30-32.) The affidavit infers that the Group A seniority date, although it does not so state, was accorded to the plaintiffs at the time of their initial employment. Furthermore, the statement is made in the same affidavit (Tr. 28) that seniority dates on the Group A roster run back as far as the year 1916, the specific implication being that seniority dates acquired in the year 1916 were acquired when

the individuals were first employed. The implication is false and the seniority dates shown in Exhibit A were not acquired when the individuals were first employed.

This can easily be established by reference to the seniority roster dated January 1, 1948, relied upon in Exhibit (A) attached to the affidavit of H. A. Hansen, verified November 12, 1949. (Tr.-Affidavit pp. 111-127; Ex. A pp. 127-135.)

We turn now to Exhibit A attached to the Auguston affidavit. (Tr. p. 30.) The following names have been checked from the seniority register for the Omaha district dated January 1, 1948 and we shall follow the tabulation contained in Exhibit A, except we shall add two more columns, one disclosing the date of original employment, the other disclosing the group in which seniority was originally assigned. This important additional material was not furnished to the Court in Exhibit A.

Name	Original Employment	Original Seniority Group	Group A Seniority Dates
John Bukey	2/ 7/18	B	4/12/49 ¹
Richard Buntin	8/ 9/44	B	6/ 2/46
Henry Burnett	7/26/42	B	None obtained
Willie R. Burton	12/ 9/45	B	8/24/46
M. J. Clayton	7/12/39	B	6/ 2/46
Tom D. Clerkley	6/30/44	B	6/ 2/46
Robert M. Ewing	8/ 1/35	B	9/ 1/47
Langston Gardner	7/11/44	B	6/ 2/46
Edward W. Hamilton	7/ 9/41	B	6/ 2/46
Luther W. Jackson	1/17/43	B	1/23/45
Edward M. Jones	8/15/16	B	6/ 2/46 ²
Theodore R. Jones	7/18/35	B	6/ 2/46
Henry O. Jury	9/29/42	B	6/ 2/46
L. A. King	5/13/45	B	6/13/46
Walter M. Moore	3/30/43	B	4/20/45
Belford M. Moses	7/ 3/39	B	6/ 2/46
Oliver E. Odom	7/ 7/39	B	6/ 2/46
Charles M. Renfro	6/19/41	B	6/ 2/46
Benjamin Robinson	9/ 1/37	B	6/ 2/46
Harvey H. Robinson	7/30/41	B	6/ 2/46
John J. Shanks	1/25/45	B	6/ 2/46
Spencer L. French	3/12/28	B	None obtained
Charles A. Smith	7/ 6/42	B	6/ 2/46
Thomas R. Spikes	6/15/42	B	6/ 2/46
Vernell Thompson	1/ 1/46	B	8/ 1/46
Charles Winston	6/25/41	B	6/ 2/46

¹See discussion of this case, affidavit of Thomas E. Hayes, verified October 15, 1949 (Tr. 60-78) at pages 65 to 67.

²See discussion of this case, affidavit of Thomas E. Hayes, verified October 15, 1949 (Tr. 60-78) at pages 66 and 67.

It thus appears that with regard at least to the individuals just above enumerated the evidence is conclusive that they were initially hired and assigned a seniority date in Group B merely because they were negroes, and not until much later did they ever get a seniority date in Group A. The lapse of time be-

tween the date of initial hiring and automatic assignment to Group B on the one hand, and the date when seniority was accorded in Group A shows conclusively that when first employed these individuals obtained no Group A seniority but were relegated to Group B and merely because they were negroes.

These facts are enough to discredit the Auguston affidavit (Tr. 25-32) but the affidavit and the falsity of its maker is thoroughly emphasized by the following circumstances. The affidavit concludes with this statement: "Neither plaintiff nor any other person at any time mentioned in the complaint called such alleged act of discrimination to the attention of defendant Union or made any request that defendant Union take action in respect thereto." (Tr. 29.) In the Hayes affidavit, verified October 15, 1949 (Tr. 60-78) at page 71, detailed correspondence between Hayes and Auguston concerning the issue is set forth. In the affidavit of Hansen, verified October 21, 1949 (Tr. 80-91) at pages 84 and 85, it is admitted that one at least of the letters referred to in the Hayes affidavit actually exists, for the letter is in part set forth in the affidavit. In fact the text of the letter is quoted in part in Railroad's brief. (Br. p. 8.)

Therefore, the statement in the Auguston affidavit that no complaint had ever been made to the Union or any of its officers can be nothing less than a deliberate and a conscious falsehood. The Auguston affidavit is unworthy of any belief whatsoever. Incidentally, Railroad has never repudiated Auguston or this particular affidavit. In fact, Hansen attempted to

correct certain "minor and inconsequential errors." (Tr. 91.) The truth of the matter is that all of the affidavits submitted were designed to mislead the Court into thinking that many if not all of the appellants actually acquired seniority dates in Group A at the time of initial hiring.

The Hansen affidavits are equally unreliable. In an affidavit verified by Hansen October 21, 1949 (Tr. 80-91) at page 88 he states that "Mr. Hayes was discharged from the service of the defendant Railroad Company as a chef in 1937 because he had falsified his age in making application for his original employment and when he was rehired in 1942 he was hired as a Group B second cook which was the only work available at the time."

In an affidavit verified by Hayes October 31, 1949 (Tr. 102-109) at pages 106 to 108, Hayes gives a complete history of his employment and the real reason why he was discharged, and he states categorically that he made no representation as to his age.

The only reply which Hansen made is contained in his affidavit verified November 12, 1949 (Tr. 111-127) at page 124, in which he states: "There is no basis or foundation in fact for Mr. Hayes' assertion in this regard, and he was, as I stated in my affidavit, discharged from the defendant's employ in 1936 because he had falsified his age in his employment application." The affidavits submitted by Railroad and Union were, it is suggested, prepared upon the time-honored theory that all a white man needs to do when an issue

of veracity arises between him and a negro, is to say, "It isn't so."

Another illustration of Hansen's reckless use of affidavits has to do with Hansen's knowledge of his own employment records.

There were filed in this proceeding certain objections to interrogatories propounded to Railroad by appellants. These objections were supported by an affidavit verified by Hansen August 26, 1949. This affidavit is not in the transcript because neither side thought it necessary in the making of a record requisite for the determination of the issues raised in this case. But the affidavit itself is referred to in various parts of the transcript. The affidavit in question stated that "Horace Burnett, Leadis Kettor, William B. Regen, Leonard D. Riwers, John J. Shanks, and Pall E. Woods have never been employed by the Union Pacific Railroad Company in the cook's craft or in its dining car service, and that although diligent search has been made no record of any employment in the dining car service of the Union Pacific Railroad Company of said above-named persons has been found."

When this situation was brought to the attention of Hayes, he made an affidavit verified October 15, 1949 (Tr. 60-78) wherein at page 62 he gave specific information as to the exact locations where the individuals in question were working.

In reply to this affidavit Hansen in an affidavit verified October 21, 1949 (Tr. 80-91) at page 83, was finally forced to admit that John J. Shanks, one of the

individuals whom he said had never been employed by Railroad in any capacity, was and is employed in the dining car department.

The Hansen affidavits, therefore, are clearly wholly unreliable. Their only purpose was to defeat the allegation of the original complaint that the negroes, solely because they were negroes, were precluded from asserting seniority in higher groups and classes. But, as will appear later, we are not relying upon that allegation at the present time as related to all of the appellants.

Another subsidiary purpose of the Hansen affidavits was to refute the contention of the appellants that negroes were, when first employed, assigned seniority dates in Group B arbitrarily and automatically because they were negroes, whereas whites similarly employed were assigned seniority dates in Group A. It may be that as a result of the struggle for the abolition of the vicious discriminatory practices indulged in by Railroad against its negro employees that certain procedures have been abolished and that some negroes belatedly have been accorded rights which had previously been denied.

The fact remains, however, that every one of the appellant cooks was, when initially hired, assigned automatically to seniority Group B and no amount of evidence which establishes that this general practice may have been abandoned can eliminate the fact that the appellant cooks in this case were hired when the practice was in full force, and that they have been the victims of it ever since.

Counsel for Railroad calls particular attention to the fact that "The Union which represents and admits to membership both colored and white employees has not asked Railroad to change the seniority provision of the agreement to carry out the desires of the group represented by appellant Hayes." (Br. p. 8.) Evidently he attributes considerable significance to this circumstance. He is right. The circumstance is significant and the significance is that Union is under the domination of Railroad, is discriminating against the negroes whom it represents, and to all intents and purposes is a company union. It has, through the collective bargaining process, penalized some of those whom it purports to represent and it has done so in the interests of its white membership in the Union. Without this cooperation Railroad would never have dared to enforce its discrimination policies against negroes.

(C) Issues involved.

When the complaint was first prepared counsel had no personal knowledge of the facts, all of which was gained by long distance correspondence between Mr. Bromsen in New York and Mr. Hayes in Omaha. Many of the men involved did not know their own seniority ratings because Railroad never publishes the seniority list for the new year in January of each year, as the contract requires, but on the contrary delays the publication for many months. Many of the men did not know that they had been given any seniority status in Group A because that fact had made no difference in their pay or emoluments as it was impos-

sible for them to overcome in bidding on any jobs the initial discrimination imposed upon them when they were first hired, that is, relegating them to seniority dates in Group B.

As a result of the difficulties of communication and of gaining a thorough understanding of the facts, the complaint as first prepared contained misstatements of fact which, as soon as the true facts were developed, were corrected in the proposed amended complaint.

The issues were, we think, very clearly stated in our opening brief (Br. p. 12) and the questions of law involved were stated with equal clarity in that same brief (Br. p. 13) and we shall not enlarge upon what has been previously stated.

In other words, as soon as it was ascertained that some of the allegations of fact in the original complaint were not true we admittedly took the steps to correct the situation by seeking to file the amended complaint. The purpose of the amended complaint is clearly outlined in our opening brief. (Br. pp. 9-13.)

The next main topic for discussion is Railroad's argument. We do not feel it necessary to deal specifically with Railroad's summary of argument because whatever might be said with respect to the summary is equally applicable to the argument itself. We proceed, therefore, immediately to a discussion of the first point made by Railroad under the head of argument and it is

I.

AN ACTION FOR A BREACH OF CONTRACT DOES NOT
PRESENT A FEDERAL QUESTION.

With this principle of law we are in complete accord, and the cases cited by Railroad substantiate its position. Never at any time have we taken the position that the instant case involved a breach of contract. The distinction between cases involving merely a breach of contract and the case at bar is well illustrated by the cases cited by Railroad in support of its axiomatic position. Take the following case:

Starke v. N.Y.C. & St. Louis R.R. Co., 17 Labor Cases, par. 65,629.

This case arose in the United States Court of Appeals for the Seventh Circuit on appeal from the District Court for the Northern District of Illinois. The gist of plaintiff's cause of action was that the defendant Railroad improperly placed plaintiff in a seniority position below that of two other machinists whose accumulated seniority was less than that of plaintiff. In this case the plaintiff relied upon

Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U.S. 210,

and what is substantially a companion case,

Graham v. Brotherhood of Locomotive Firemen & Enginemen, 338 U.S. 232.

In discussing these cases the Court said:

“In these cases, as will be noted, the suits were against both the carrier and the Brotherhood as the bargaining agent for the employees and, in short, rested upon the premise that the agree-

ments made were discriminatory and in violation of the plaintiff's statutory and constitutional rights. As the Court in the *Tunstall* case stated (page 213): 'It is the Federal statute which condemns as unlawful the Brotherhood's conduct.' In contrast, there is no contention here that the agreement relied upon is condemned by the statute, but on the other hand it concededly is in conformity therewith.' "

This case (the *Starke* case) illustrates very clearly the difference between the breach of contract cases cited under Railroad's Point I of argument and the case presented by this appeal. In the *Starke* case there was no discrimination alleged and the collective bargaining agent was not even joined as a defendant whereas in the case at bar a discriminatory conduct and practice is clearly alleged and both Railroad and the collective bargaining agent are sued.

It would be bootless to examine the rest of the cases cited by Railroad in its brief at page 17 because every one of them involves merely a breach of contract and in none of them is the collective bargaining agent joined except in the case of *Malone v. Gardner*, 62 F. (2d) 15, where the complaint charged a conspiracy between the collective bargaining agent and Railroad to violate a collective bargaining agreement. In short, in none of these cases was there any issue of discrimination solely on the ground of race, which is the vice condemned by the Supreme Court of the United States in the *Steele* case, 323 U.S. 192, 89 L. Ed. 173, and the *Tunstall* case, 323 U.S. 210, 89 L. Ed. 187.

II.

RAILWAY LABOR ACT DOES NOT PROHIBIT RACIAL
DISCRIMINATION BY RAILROADS.

This statement is literally true but it does not advance the argument or the understanding of the issues in this case. We have no quarrel with any of the cases cited by Railroad in support of its position. (Br. pages 18 and 19.) We do, however, take issue with Railroad's effort under this head of argument to distinguish and whittle down the *Tunstall* and *Steele* cases, *supra*.

In the first place, let it be understood that we have never taken the position that the Railway Labor Act either expressly or impliedly forbids discrimination against negroes either at the time of first employment or in their treatment thereafter. We do contend, however, that when the discrimination arises out of and is perpetuated through the collective bargaining process such discrimination has met the condemnation of the Supreme Court in the *Steele* and *Tunstall* cases.

In these cases, even though the question was not directly involved, it is nevertheless true that the original bargaining agreements under which negro firemen acquired seniority of which they were subsequently deprived, classified them as non-promotable and white firemen as promotable. The only basis for the discrimination was clearly that of color and there is no question but that any such agreement in the making of which the Railroad and collective bargaining agent

participated is a direct violation of the principles laid down in the *Steele* and *Tunstall* cases. At a slightly later point in this case we shall have more to say about these two cases.

III.

CAUSES OF ACTION AGAINST THE RAILROAD AND UNION ARE SEPARATE AND DISTINCT.

This is evidently a straw man set up by Railroad for the purpose of demolishing it. If the situation contended for by Railroad were actually true, that is, if there were two separate causes of action, one against Union and one against Railroad, the conclusion drawn by Railroad might be plausible, but the fact of the matter is that the gist of both the original complaint and the proposed amended complaint is that the discrimination of which complaint is made came about through the collective bargaining process, and if it did the case at bar falls squarely within the principle of the *Steele* and *Tunstall* cases, *supra*.

Under this heading there is some discussion of the meaning of the word "connivance". This subject matter, however, has been fully covered in our opening brief (Br., Point IV, pages 29-31) and we shall not repeat what was said there.

IV.

FACTS DISCLOSED BY THE AFFIDAVIT SHOW COURT
IS WITHOUT JURISDICTION.

The point here made is that the affidavits fail to show discrimination. The affidavits are in hopeless conflict but nevertheless our analysis of the seniority history of twenty-six of the appellants herein (*supra*, page 7), shows conclusively the existence in their case of discrimination at the time of initial hiring, in that they were relegated to a seniority date in Class B solely because they were negroes, and, not until after the lapse of considerable time, in one case thirty years, were they ever able to obtain a seniority date in Group A. The affidavits submitted by Railroad and Union have been cleverly devised so as to befog the issue but they do not succeed in contradicting the situation in the case of the twenty-six individuals referred to above.

The analysis was based upon the seniority roster of the Omaha District for the year 1948. Inasmuch as we do not have access to the seniority roster in other districts nor to the system seniority roster we are not able to include in the analysis the seniority history of all of the appellants. We submit, however, that the statistical matter which we have adduced with respect to the twenty-six individuals above referred to is sufficient to establish our point.

While it is true that the Court always has power to conduct an individual inquiry to determine whether or not it has jurisdiction and while it can use affidavits for this purpose, it does not customarily resort to

affidavits which are hopelessly in conflict. In *American Insurance Company v. Bradley Mining Company*, 57 F. Supp. 545, cited by Railroad, the facts developed by the affidavits were not in dispute. On the other hand the better practice seems to be that outlined in *Borden's Farm Products Company v. Baldwin*, 293 U.S. 194, 79 L. Ed. 281, in which the Court said:

“But the case is not before us upon evidence or upon allegations of fact based on evidence as *the complaint was dismissed solely in the view that it failed to state a cause of action and the motion for injunction accordingly fell with findings being made.* As we have said, we may read the complaint in the light of facts of which we may take judicial notice but if so read it may be regarded as sufficient. The decision of this appeal should not turn on other facts which are the proper subjects of evidence and of determinations of fact by the trial court.”

No matter how much Railroad may try to disguise the fact, the Court below, as can clearly be seen from a consideration of its opinion, was not at all influenced by nor did it consider the affidavits in reaching the conclusion that it did.

At the risk of boresome repetition we call the attention of the Court to the following language. In that opinion all it did was to analyze the complaint and the proposed amended complaint, after which it made the following statement: “The question of jurisdiction being decisive, it is not necessary to consider the

other motions, and respondent's motion to dismiss the action must be granted. It is so ordered." (Tr. 143-144.)

V.

THE JUDGMENT OF DISMISSAL WAS PROPER SUMMARY JUDGMENT FOR APPELLEES.

The vice of this point of Railroad's argument lies in the fact that it is predicated upon the fact that the judgment of dismissal was proper in the light of the affidavits. There was no finding by the Court below that the affidavits did not create an issue as to any material fact and without such finding the judgment of dismissal cannot be considered as a summary judgment by Railroad and Union.

VI.

RAILWAY ADJUSTMENT BOARD HAS EXCLUSIVE JURISDICTION OF THIS CONTROVERSY.

This point of argument is based exclusively on the decision in the case of *Slocum v. D. L. & W. R. Co.*, 339 U. S. 239, 94 L. Ed. 534, but even counsel for Railroad admit (R.R. Br. page 32) that the *Slocum* case does not overrule the *Steele* or *Tunstall* cases and that the *Slocum* case does not have application in a situation where the *Steele* and *Tunstall* cases apply.

Moreover there is in the *Steele* case a specific holding that the plaintiffs were not required to exhaust

the administrative processes by applying to the Railway Adjustment Board because the Court was not able to find that a hearing before either of these tribunals, constituted as they were by individuals who had already prejudged the issue, would constitute an adequate administrative remedy. (323 U.S., page 206, 89 L. Ed., page 185.)

VII.

THE COURT PROPERLY DENIED LEAVE TO FILE AMENDED COMPLAINT BECAUSE IT IS A SHAM.

The situation at the time it was sought to file the amended complaint was as follows: Argument had been had upon the motion to dismiss the original complaint and during the course of that argument counsel for appellants told the Court that if its ruling should be adverse to appellants, counsel would like the opportunity to amend the complaint so as to present the issue in the strongest possible form to the Appellate Court and the Court assured counsel that he would have the opportunity to prepare the strongest pleading compatible with the facts. What counsel was trying to avoid was a fruitless appeal in which an adverse decision might be rendered on a technicality which might be eliminated by amendment.

In whatever way it is attempted to disguise the facts in the case at bar, whether by affidavit or by argument, it is not and cannot be contradicted that twenty-six at least of the appellants were, at the time they were initially hired, relegated to seniority in

Group B solely because they were negroes. Now, how did this come about? It was an established practice of Railroad, just as it was an established practice of the southern roads, to classify negroes as non-promotable, as shown by the *Steele* and *Tunstall* cases. This was the situation which existed when the collective bargaining agreement in the case at bar was argued by Railroad and Union, effective June 1, 1942. That agreement was executed in the light of the discriminatory practice and the only reason why the agreement retained the group and class seniority classifications was to perpetuate the discriminatory practice against the negroes. It is obvious, therefore, that as a result of the collective bargaining process the new contract of June 1, 1942 recognized the existing discriminatory practice because it was agreed by Railroad and Union that the contract should be interpreted in the light of that practice.

Suppose the new contract had stated in explicit terms, after having set up the group and class seniority provisions, that negro cooks when first employed shall be given seniority dates in Group B only because they are negro and white cooks similarly employed shall be given seniority dates in Group A because they are white. Could there be any possible doubt that the collective bargaining agent had grossly betrayed its trust and used the collective bargaining process for the purpose of discriminating against the negroes it was supposed to represent?

Now, we have no express contract to that effect and the reason we haven't, is that in the light of the *Steele*

and *Tunstall* cases it would be stupid to write a contract which would immediately be stricken down by the courts.

But discrimination is an exceedingly subtle thing and it takes many forms, many of which are very difficult to trace in practice. But it is submitted that this Court cannot close its eyes to the realities of the situation and cannot fail to recognize the role that the collective bargaining process played in the case at bar in perpetuating the discriminatory practice.

Now if it be sham to attempt to get the true situation before the Court by an amended pleading, then any amendment can be characterized as sham. There is no bad faith here but only an honest effort on the part of counsel to present the case to the Court in the strongest possible light.

VIII.

PROPOSED AMENDED COMPLAINT DID NOT STATE CLAIM UPON WHICH RELIEF COULD BE GRANTED.

The gist of this argument is that a complaint which failed to allege that Railroad has assigned all negroes hired by it to lower seniority groups and classes when first employed, fails to state a cause of racial discrimination. This contention is obviously without merit. Each of the appellants is interested in his particular condition and in that of any other negro who finds himself in a similar condition. If there is discrimination against these appellants and if the

case at bar falls within the principle of the *Steele* and *Tunstall* cases, *supra*, these appellants are entitled to relief.

Take, for example, the *Tunstall* case, *supra*. It appears that the only recovery in this case was \$1,000 for Tunstall. (*Brotherhood of Locomotive Firemen v. Tunstall*, 163 F. (2d) 289, 291.) The litigation, therefore, apparently involved only one engineer and there is no record of any engineer other than Tunstall participating in any recovery.

The people discriminated against are the ones who have the cause of action and also we think there has been discrimination against others of the same class. If discrimination against the particular litigant can be established it is immaterial that it does or does not exist presently in the case of other negroes.

The second ground upon which Railroad relies is that the verbal understanding violated the Statute of Frauds and it cites the California Civil Code, paragraph 1624. (R.R. Br. 38.) What the California Code has to do with the situation is beyond our understanding. There is no allegation that the verbal notification took place in California and the California statute has no application.

It is also urged that the verbal understanding violates the parol evidence rule but there is no reason why a written agreement may not be modified by an executed subsequent oral agreement.

The straws upon which Railroad is here leaning demonstrate the weakness of its case. It is novel doc-

trine that parties can excuse themselves from a violation of positive obligations cast upon them by law, by recourse to the contention that the violation is based upon a contract that is not enforceable. It may not be legally enforceable, but there is no doubt that the parties have acted upon the tacit contract and understanding and recognized its terms in practice. In other words, the discrimination practiced by the Railroad has been fortified by the collective bargaining process. Under this heading the Railroad makes another effort to distinguish the *Tunstall* and *Steele* cases. The distinction relied upon this time is that in those cases there was collective bargaining actively destructive of existing accrued rights, whereas in the case at bar the relief is sought with respect to the future. This, as we shall show under another heading, is not the case.

The last argument under this heading is that even if there were such a verbal understanding for the perpetuation of a discriminatory practice as is alleged it would not be unlawful. The reason is that in the *Steele* and *Tunstall* cases there was already a discriminatory practice, namely, that negro firemen were not promotable to the post of engineer although white firemen were, and because the Court failed to criticize this contract this Court will similarly close its eyes to the alleged verbal understanding for the perpetuation of discrimination.

We have already remarked, and we repeat, that no matter what the Court did in the *Steele* and *Tun-*

stall cases, it was not at any time asked to pass upon the validity of the discrimination expressed in collective bargaining agreements made between the collective bargaining agent and the Railroad to the effect that negro firemen were not promotable. Had that question been raised, the Court which held that the collective bargaining agent had no power to discriminate against any of those it represented, could not have failed to condemn a contract arising out of the collective bargaining process which stigmatized the negro firemen as non-promotable solely because they were negroes.

The argument is fallacious. It proceeds upon the mistaken assumption that a collective bargaining agreement which characterizes some of the employees within its scope as non-promotable solely because of race is valid, whereas in truth such an agreement violates every principle established by the *Steele* and *Tunstall* cases.

The argument then proceeds upon the theory that if the original agreement barring negroes from promotion in the *Steele* and *Tunstall* cases is valid then the verbal agreement perpetuating the discriminatory practice of Railroad is likewise valid. The vice, however, lies in the major assumption that the original contract in the *Steele* and *Tunstall* cases was valid, a conclusion based exclusively upon the fact that it was not attacked.

The reason for the failure to attack is obvious. The original contract, discriminatory as it was, had en-

abled the non-promotable negro firemen to build up seniority and it was to protect these accrued seniority rights that litigation ensued resulting in the declaration that the subsequent contracts negotiated through the collective bargaining process which deprived the negro firemen of their accrued seniority, were invalid.

The final argument is that there is

NO JUSTICIABLE CONTROVERSY.

This argument is based upon the alleged fact that the relief sought is in the future. An examination of the prayer in the original complaint (Tr. 9 and 10) and in the proposed amended complaint (Tr. 158-160) shows that all relief sought is retroactive.

It is said that to accord seniority dates to the appellants in the manner demanded would adversely affect seniority rights of white cooks and other colored cooks who hold older seniority rights in Group A than the appellants. This is tantamount to saying that because the recognition of the rights of the appellants will adversely affect others who have benefited from the discrimination practiced against the appellants, the latter can have no relief. It is claimed that this is rewriting the contract. This is a familiar cry whenever it is sought to remedy an injustice that will adversely affect others who have benefited by it.

What has happened up to date is that the appellants have as a result of the collective bargaining process been discriminated against with respect to the acquisition of seniority in higher groups and classes than those to which they were assigned sen-

iority dates when first employed, and this solely upon the ground that they were negroes.

There could be no possible objection to classifying employees with respect to their fitness, capacity, skill or previous experience, and seniority dates assigned with reference to these considerations would be beyond any attack. If Railroad can, with respect to these specific considerations, independently of race, justify the seniority dates originally assigned to any of the appellants there is no discrimination, but if seniority dates were assigned discriminatorily and to the prejudice of appellants, the fact that there will be difficulties in adjusting their rights if they prevail is no sound argument against the recognition of the wrong which has been done them.

CONCLUSION.

In bringing to a close the reply to Railroad we wish to point out that in our opinion the fundamental weakness of its entire position is the unqualified assumption that the Railway Labor Act is not a Fair Employment Practices Act. Literally, this is true but when the collective bargaining agent by virtue of the collective bargaining process establishes, sanctions or perpetuates discrimination against any of those it is supposed to represent such discrimination cannot be justified.

Several times in Railroad's brief it has said in effect that independently of the collective bargaining

agent it could discriminate against negroes to any extent it desired and that what it can do alone it can do equally well with the cooperation of the collective bargaining agent. If this be true, then the *Steele* and *Tunstall* cases have been robbed of all significance, but until those cases are reversed, this position of Railroad is entirely fallacious, not to say disingenuous.

REPLY TO UNION'S BRIEF.

Most of the points made in Union's brief have already been fully discussed and it only remains to deal with a few matters which apparently are peculiar to Union's brief.

At the outset it is alleged that the appellant Hayes was the only party plaintiff below (Br. p. 1) and reference is made to pages 15 and 16 of the brief for further discussion of the point under the title "The parties."

In view of the momentous issues raised by this litigation, this question about parties seems quite puerile. The original complaint (Tr. 2-11) bore only the name of Thomas E. Hayes as plaintiff in the caption. But attached to the complaint was an Exhibit A listing the names of a large number of other individuals who in the first paragraph of complaint (Tr. 2) were described as plaintiffs. The filing of this complaint was the opening gun in this litigation. It would have been perfectly proper and lawful without recourse to any Court to have included the names of all of those

listed in Exhibit A of the complaint in the caption as plaintiffs, but whether listed in the caption or identified in the complaint as parties plaintiff, they became such without further ado. However, respondent saw fit to attack the complaint upon the theory that there was only one party interested, namely, Hayes. So to avoid argument the complaint was amended by incorporating all of the names in Exhibit A in the caption. This maneuver was attacked as an effort to accomplish intervention without complying with F.R.C.P. The issue was never passed upon and it had been our position from the start that the plaintiffs in the action and the appellants here are those who were named in the original complaint, either in the caption or in Exhibit A.

A second amendment to the complaint was filed merely to add new plaintiffs upon the theory that there had been no responsive pleading submitted by either of the defendants and, therefore, it was not necessary to obtain leave of Court to amend the complaint. In this we were apparently mistaken because there are one or two lower Court decisions holding that an amendment to add new parties is in effect intervention and must be accomplished in accordance with F.R.C.P. However, the point is, as we say, puerile as compared with the magnitude of the issues raised by the litigation and we shall not discuss it further. The only amendments to the complaint, other than the proposed amended complaint submitted after decision of the Court below were these two amendments to straighten out the question of the parties.

Certain it is that if the judgment of the Court below is reversed by this Court no substantial difficulty is anticipated with respect to the question of the parties.

The next point which is peculiar to Union's brief is the following: Emphasis is placed upon the allegation of the proposed amended complaint that the written contract did not contain any standard for determining the seniority group and class of new employees and this allegation is characterized as follows (Br. p. 13): "Reference is made to Rule 17(b) of the contract which is said to provide in plain terms that a new employee on the completion of the first ninety days of continuous service is to be accorded a seniority class and group in which such ninety days of continuous service is completed in all lower classes in that group and in all corresponding and lower grades in all lower groups."

This provision is said to be a standard for determining the seniority group and class of new employees. One question will expose the fallacy of the contention and that question is, who determines in what group or class the first ninety days of continuous service shall take place and upon what basis? Obviously, the contract gives no answer and the only answer is to be found in the discriminatory practice already sufficiently discussed.

The last point that we shall discuss is the terms of the judgment. (Br. 14.) As we have already said, the original judgment followed an opinion by the Court. (Tr. 136-144.) This was dated January 19, 1950. The next order was a minute Order dated Feb-

ruary 13, 1950 (Tr. 163) followed by a judgment of dismissal. (Tr. 164-165.)

Notwithstanding the clear statement of the Court in its opinion that the only issue considered was that of jurisdiction and that there was no reference in the opinion to the affidavits nor any reliance placed thereon, counsel for respondents deliberately prepared an Order of Dismissal that did not recite the facts, but on the contrary recited, "And it appearing to the Court after considering the complaint, the amendments thereto, the affidavits filed by the parties, and the statements of counsel that there is no genuine issue as to any material fact, and that the said defendants are entitled to judgment of dismissal."

Because of the fact that the judgment as prepared did not correspond to the Order of January 19 (Tr. 136-144), counsel refused to approve it as to form but merely acknowledged receipt of a copy. It can easily be seen that counsel was endeavoring to obtain in the Order rulings which had not been made by the Court.

CONCLUSION.

As was said in our opening brief, it is respectfully submitted that the original complaint was, notwithstanding the opinion of the Court below, sufficient to show jurisdiction in the Court and stated a claim upon which relief could have been granted, and that the only purpose of asking leave to file the amended

complaint was, first, to give the Court below an opportunity to reconsider its decision, and, secondly, to present the matter to this Court in the best possible form. Emphasis is placed by Union upon the fact that the complaint had been twice amended and a formal supplementary complaint had been filed. The two amendments were first, incorporating in the caption the names which were originally found in Exhibit A of the original complaint, and second, adding a few new parties. The supplemental complaint is not in the transcript and has no bearing on the situation. One would gather, however, from the emphasis placed upon the amendments that counsel had been attempting to amend the complaint in substance. This is not true, and the only attempt of that character is to be found in the proposed amended complaint.

We submit, therefore, the judgment of the Court below should be reversed and the cause remanded for further proceedings.

Dated, San Francisco, California,

July 26, 1950.

Respectfully submitted,

HAROLD M. SAWYER,

Solicitor for Appellants.

ARCHIBALD BROMSEN,

GLADSTEIN, ANDERSEN, RESNER & LEONARD,

Of Counsel.

No. 12,509

IN THE

United States Court of Appeals
For the Ninth Circuit

THOMAS E. HAYES, et al., on Behalf of
Himself and All Others Similarly
Situating,

Appellants,

vs.

UNION PACIFIC RAILROAD Co. (a corpo-
ration) and DINING CAR EMPLOYEES
UNION LOCAL 372 (a voluntary un-
incorporated labor organization);
and JAMES G. BARKDOLL, as District
Director of said Local 372 in the
District of Los Angeles, State of
California,

Appellees.

APPELLANTS' PETITION FOR A REHEARING.

HAROLD M. SAWYER,

240 Montgomery Street, San Francisco 4, California,

*Solicitor for Appellants
and Petitioners.*

ARCHIBALD BROMSEN,

450 Seventh Avenue, New York 1, New York,

GLADSTEIN, ANDERSEN, RESNER & LEONARD,

240 Montgomery Street, San Francisco 4, California,

Of Counsel.

FILED

SEP 20 1950

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incorporated labor organization);
and JAMES G. BARKDOLL, as District
Director of said Local 372 in the
District of Los Angeles, State of
California,

Appellees.

APPELLANTS' PETITION FOR A REHEARING.

*To the Honorable William Denman, Chief Judge, and
to the Honorable Associate Judges of the United
States Court of Appeals for the Ninth Circuit:*

The petition of appellants Thomas E. Hayes, et al.
for rehearing herein, respectfully alleges as follows:

I.

THE OPINION OF THE COURT APPEARS TO BE PREDICATED
UPON A COMPLETE MISCONCEPTION OF THE RECORD.

This misconception is expressed in the following sentence:

“It was not claimed below nor here that the collective bargaining agreement executed by respondent Union, as the bargaining representative of the employees, and respondent Railroad, in any manner by its terms, directly or *indirectly* provided for any discrimination against appellants. Appellants claimed below that the *conduct of the respondent in performing the agreement was discriminatory.*” (Emphasis added.)

Neither of the above statements is correct. It is true that appellants have conceded that the language of the agreement in and of itself and divorced from every other factor in the case, is not discriminatory. The concession merely means that there is no language in the agreement which specifically provides that, when initially employed, all Negro cooks shall merely because of race be assigned a seniority date in Group B whereas all white cooks purely on racial grounds, shall be assigned a seniority date in Group A. The pleadings show that when the collective bargaining agreement was made, this racially discriminatory practice was in existence; that the alphabetical group system of seniority was placed in the agreement for the express purpose of perpetuating this discriminatory arrangement, and that all of the appellants, when initially hired, were the victims of it. (Tr. 155-156.)

Appellants pointed out that the agreement itself contained no yardstick for determining who, upon initial hiring, should be assigned seniority dates in Groups A, B, or C, and the matter was left solely to chance. The yardstick, however, is found outside of the agreement. The discriminatory practice, in the light of which the agreement was negotiated, constitutes the yardstick which is a simple and easily applied formula—all Negroes in Group B, all whites in Group A. It is as if a secret code was incorporated in the agreement; Group B means Negro. Group A means white. Without, however, the discriminatory practice, the alphabetical system of seniority groups is meaningless; but in the discriminatory practice is the key to an otherwise meaningless classification.

The vice does not lie in the practice, but in a skillfully devised system of seniority which becomes intelligible only when the discriminatory practice furnishes the key to its application.

The alphabetical system of group seniority, in the absence of standards set forth in the agreement for determining the qualifications necessary for admittance to the several groups, is devoid of any meaning or significance and can serve no other purpose than to permit the continued existence of the discriminatory practice. This being the purpose of the agreement, it can hardly be denied that the discrimination grows out of the collective bargaining process.

For further discussion of this point, see appellants' opening brief, pages 19 and 20, and appellants' closing brief, pages 21-23.

II.

THE DECISION OF THIS COURT IN EFFECT NULLIFIES THE LEGALLY SOUND AND ETHICALLY CORRECT DECISIONS OF THE SUPREME COURT IN THE CASES OF STEELE v. LOUISVILLE AND NASHVILLE RR. CO., 323 U.S. 192, 89 L. Ed. 173, AND TUNSTALL v. BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, 323 U.S. 210, 89 L. Ed. 187.

The decision in this case is notice to railroads and complacent unions that all that is necessary to avoid the prohibition against discrimination established in the *Steele* and *Tunstall* cases is to confine discrimination to practice. Avoid any provisions in the collective bargaining agreement for racial discrimination in terms, but be sure to insert some provision which is meaningless until construed in the light of a discriminatory practice and which can have no other purpose than perpetuation of the practice. The decision of the Court in the instant case is, it is submitted, in effect a guidepost to those subject to the Railway Labor Act pointing the way by which discrimination can be easily accomplished if care is taken to draw a contract which does not in express terms provide for discrimination exclusively on the ground of race, but which becomes discriminatory when interpreted and applied by means of an existing discriminatory practice.

III.

APPELLANTS WERE DENIED DUE PROCESS OF LAW BY
THE COMPOSITION OF THE COURT.

The Court was composed of the Honorable William E. Orr, Circuit Judge; Honorable Louis E. Goodman,

District Judge, and Honorable Dal M. Lemmon, District Judge. The two District Judges came from the same district in which Honorable Michael J. Roche is Senior Judge. The decree appealed from was made by Judge Roche. The Court was therefore composed of one Appellate judge and two District judges from Judge Roche's District, but junior to him. Under these circumstances an unjust burden was placed upon them. Only with the greatest reluctance would either have reversed Judge Roche. An Appellate Court of such composition is, it is respectfully submitted, an appellate body in name only. To compel appellants to submit their appeal to such a body is a denial of due process of law and tends to negate the appellate process.

Wherefore, appellants pray that the order affirming the judgment of the Court below be set aside and that a rehearing may be had before an impartially constituted court of appeal.

Dated, San Francisco, California,
September 20, 1950.

Respectfully submitted,

HAROLD M. SAWYER,

*Solicitor for Appellants
and Petitioners.*

ARCHIBALD BROMSEN,

GLADSTEIN, ANDERSEN, RESNER & LEONARD,

Of Counsel.

No. 12510

United States
Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,
vs.

CIA. LUZ STEARICA, a Corporation,
Appellee.

Apostles on Appeal

Appeal from the United States District Court,
Western District of Washington,
Northern Division.

FILED

AUG 4 1950

PAUL P. O'BRIEN,

CLERK

No. 12510

United States
Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,
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NAMES AND ADDRESSES OF PROCTORS

CLAUDE E. WAKEFIELD and
M. BAYARD CRUTCHER, of
BOGLE, BOGLE & GATES,

Proctor for Appellant,
603 Central Bldg.,
Seattle 4, Washington.

LANE SUMMERS and
CHARLES B. HOWARD of
MERRITT, SUMMERS & BUCEY,

Proctors for Appellee,
840 Central Bldg.,
Seattle 4, Washington.

In the United States District Court for the Western
District of Washington, Northern Division

In Admiralty No. 15036

CIA. LUZ STEARICA, a Corporation,
Libelant,

vs.

UNITED STATES OF AMERICA,
Respondent.

LIBEL

The libel of Cia. Luz Stearica, a corporation as libelant, against the United States of America, as respondent, in a cause of contract and cargo damage, civil and maritime, alleges as follows:

I.

At all times hereinafter mentioned libelant was, and it still is, a corporation duly organized, created and existing under and by virtue of the laws of the Republic of Brazil, with an office and place of business at Rio de Janeiro, Brazil.

II.

At all times hereinafter mentioned, respondent, United States of America, was, and it still is, a corporation sovereign and owned, operated and controlled the steamship "Sweepstakes."

III.

At all times hereinafter mentioned, the steamship "Sweepstakes" was employed and operated by respondent, United States of America, as a merchant vessel in the common carriage of merchandise for hire between, among others, the port of New York and the port of Rio de Janeiro.

IV.

The steamship "Sweepstakes" now is within the district and within the jurisdiction of this Honorable Court.

V.

If the steamship "Sweepstakes" were privately owned or operated a proceeding in admiralty in rem against her and in personam against her owner could now be maintained by libellant.

VI.

Libellant elects to proceed against respondent, United States of America, upon the principles both of a libel in personam and of a libel in rem.

VII.

On or about the 31st day of January, 1946, International Milling Co. delivered to the steamship "Sweepstakes" and to respondent at the port of New York, 6000 sacks of wheat flour and 4500 sacks of wheat flour, in good order and condition, and respondent then and there accepted the said mer-

chandise so delivered to it and agreed to carry the same, as a common carrier, on the said steamship "Sweepstakes" from the said port of New York to the port of Rio de Janeiro, there to be delivered, in like good order and condition as when shipped, to the order of said shipper, in consideration of an agreed freight and in accordance with the valid terms of two certain bills of lading then and there signed and delivered to the shipper by the duly authorized agent of said steamship "Sweepstakes" and of respondent.

VIII.

Thereafter, respondent stowed the merchandise described in Article VII hereof on board the said steamship "Sweepstakes," in the same good order and condition as when received by it, and the said vessel, having the said merchandise on board, sailed from the port of New York, and subsequently arrived at the port of Rio de Janeiro, where the respondent and said steamship "Sweepstakes" delivered a part of the said merchandise; the part delivered, however, was not in like good order and condition as when delivered to respondent and said steamship at said port of shipment but, on the contrary, was seriously injured and damaged by contact with water and/or other substances to libelant unknown. Neither the respondent nor the steamship "Sweepstakes" has delivered the said missing flour at the port of Rio de Janeiro, or at any other port.

IX.

Libelant was at all material times the owner of the shipments referred to in Article VII hereof.

X.

By reason of the premises libelant has sustained damages in the sum of Ten thousand dollars (\$10,000), so far as the same can now be estimated, no part of which has been paid, although payment thereof has been duly demanded.

XI.

All the valid conditions precedent of said contracts of carriage to be performed by libelant have been performed.

XII.

All and singular the premises are true and within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libelant prays that upon service of a copy of this libel on the United States Attorney for this district and the mailing of a copy thereof to the Attorney General of the United States, and the filing of a sworn return of such service and mailing in accordance with law, the respondent be required to appear and answer all and singular the matters aforesaid, according to the principles of law and rules of practice obtaining in like causes between private parties, and that this Honorable Court be pleased to decree to your libelant its damages, with interest and costs, and that your libelant may have

such other and further relief as in law and justice it may be entitled to receive.

BIGHAM, ENGLAR, JONES &
HOUSTON,

MERRITT, SUMMERS &
BUCEY,

/s/ LANE SUMMERS,
Proctors for Libelant.

Duly verified.

[Endorsed]: Filed January 22, 1947.

[Title of District Court and Cause.]

ANSWER AND INTERROGATORIES

Comes now the Respondent, United States of America, and for Answer to the Libel herein admits, denies and alleges as follows:

I.

Respondent has no information sufficient to form a belief as to the allegation of Paragraph I and therefore denies the same.

II.

Respondent admits the allegations of Paragraphs II, III and IV.

III.

Respondent requires Libelant to submit proof in support of the allegations of Paragraphs V and VI and does not admit the same.

IV.

Respondent admits Paragraph VII except as to the alleged good order and condition of the flour upon delivery to the vessel as to which Respondent requires strict proof by Libelant.

V.

Respondent denies Paragraph VIII and denies that the merchandise, consisting of flour, was discharged from the vessel in a damaged condition and denies that any of said flour was missing or short upon delivery at destination.

VI.

Respondent has no information sufficient to form a belief as to the allegations of Paragraphs IX, X, XI, and XII and therefore denies the same, and particularly denies that Libelant has sustained loss or damage for which Respondent or the said vessel is liable in the sum of \$10,000.00 or any other sum whatsoever.

Further Answering and as a First Affirmative
Defense Herein, Respondent Alleges:

I.

That the shipments referred to in the Libel were carried by the Respondent aboard said vessel pursuant to the valid terms of bills of lading issued by the Respondent United States and delivered to the shippers of cargo which said bills of lading were on the regular form of Warshiplading (Form No. WSA-145) of the United States Maritime Commis-

sion, and incorporated therein specifically by reference the Carriage of Goods by Sea Act (46 USC 1300 et seq) which said bills of lading and the said statutes governed the undertakings of the parties with respect to the carriage of all of said cargo; that the originals or exact copies of said bills of lading are in the possession of the Libelant and by this reference are fully incorporated herein.

II.

That the said bills of lading contain among others the following provisions:

“This bill of lading shall have effect subject to the provisions of the Carriage of Goods By Sea Act of the United States of America approved April 16, 1936, which shall be deemed to be incorporated herein and nothing herein contained shall be deemed as surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. The provisions stated in said Act (unless or except as may be otherwise specifically provided herein) shall govern before the goods are loaded on and after they are discharged from the ship and throughout the entire time the goods are in the custody of the carrier * * *

III.

That due diligence was exercised to make said vessel seaworthy and properly manned, equipped and supplied at the beginning of the voyage. That any damage or loss sustained by or to said cargo referred to in the Libel herein while in the custody

of the Respondent or of the said vessel was not caused or contributed to by any fault or neglect on the part of the Respondent or on the part of the vessel but was the result of one of the causes excepted in the bill of lading hereinabove referred to and excepted in the Carriage of Goods By Sea Act hereinabove referred to to wit, perils of the sea and/or act or omission of the shipper or owner of the goods his agent or representative and/or inherent defect, quality or vice of the goods and/or insufficiency of packing, and that if any of said damage was the result of negligence of the officers or crew or other agents or representatives of the Respondent or of the vessel such negligence consisted of faults or errors in navigation or in the management of the vessel for which the Respondent and the said vessel are excused from liability pursuant to the applicable provisions of the said bill of lading and the said Carriage of Goods By Sea Act.

Further Answering and as a Second Affirmative
Defense Herein, Respondent Alleges:

I.

That any loss or damage to said cargo of flour as alleged in the Libel was solely caused by events or conditions and causes arising subsequent to the discharge of said vessel and said cargo after the responsibility of the Respondent and the vessel therefore had terminated and was the result of causes not within the control of Respondent or of

the vessel and as a result of causes or conditions for which the vessel and Respondent are not liable.

Wherefore, Respondent prays that the Libel herein be dismissed and that Libelant take nothing thereby and that the Respondent have and recover its costs and disbursements and for such other and further relief as may be just in the premises.

/s/ J. CHARLES DENNIS,
United States Attorney.

BOGLE, BOGLE & GATES,
/s/ CLAUDE E. WAKEFIELD,
Of Counsel,
Proctors for Respondent.

Duly verified.

[Endorsed]: Filed Nov. 15, 1947.

[Title of District Court and Cause.]

INTERROGATORIES PROPOUNDED BY
RESPONDENT TO LIBELANT

Comes now Respondent and propounds interrogatories to the Libelant to be answered in writing and under oath as follows, to wit:

Interrogatory No. 1: On what date or dates was the cargo of flour in question discharged from the "Sweepstakes" at Rio de Janeiro and delivered to Libelant?

Interrogatory No. 2: When the cargo was discharged from the vessel at Rio de Janeiro state when and how it was delivered by the ship, i.e. into customs warehouse or into railway cars, wagons, drays or trucks?

Interrogatory No. 3: If your answer to Interrogatory No. 2 above is that said cargo was discharged from the vessel into railway cars, wagons, drays or trucks, please state the following:

a) Did Libelant, its agent or representatives make arrangements for such discharge or furnish such vehicles?

b) If Libelant did not make arrangements for the vehicles into which cargo was discharged from the vessel state who did do so?

c) State the exact character of the vehicle or vehicles, i.e. whether covered or open and if open, whether the cargo was covered by tarpaulins or otherwise how protected?

d) How many such vehicles were loaded with Libelant's shipments of flour?

Interrogatory No. 4: State the date when the cargo in question was received at the premises of the Libelant or its agent or representative or consignee.

Interrogatory No. 5: State what was done, showing the exact movements of the cargo from the time of discharge from the vessel into a vehicle or vehicles until the cargo arrived at Libelant's premises or the premises of an agent, representative or consignee of Libelant.

Interrogatory No. 6: Set forth the daily rainfall at Rio de Janeiro on each day between the time the cargo in question was discharged from the vessel and the time it arrived at Libelant's premises or the premises of its agent, representative or consignee, both dates inclusive.

Interrogatory No. 7: Where was this cargo kept or stored between the time of discharge from the vessel and the time of delivery at Libelant's premises.

Interrogatory No. 8: Was the alleged damaged cargo surveyed by a surveyor and on what date and where and by whom?

Interrogatory No. 9: Was Respondent or any agent or representative of Respondent or of the said vessel given notice of the alleged damage and of the survey and invited to attend or given any other opportunity to survey or inspect the alleged damage?

Interrogatory No. 10: If your answer to the foregoing Interrogatory No. 9 is that notice and opportunity was given to Respondent to survey or inspect the cargo attach a copy, if written, or state the exact facts including when and to whom given, if oral. If your answer to the foregoing interrogatory is in the negative state why such notice and opportunity to survey or inspect the damage was not given to the Respondent, its agent or representative or to an agent or representative of the vessel.

Interrogatory No. 11: State the exact condition of the cargo on the date of the survey, including

the number of bags affected (damaged or short or slack), the extent of wetting or other damage, whether actually wet at the time of survey or whether merely stained and caked or whether both wet, stained and caked.

Interrogatory No. 12: Was any survey or inspection made by Libelant or any agent, representative or consignee of Libelant of the condition of the shipment of flour at the time the said shipment was actually being discharged from the vessel or immediately thereafter?

Interrogatory No. 13: If such a survey or inspection was made as is referred to in Interrogatory No. 12 please set forth a copy if written, or if oral, state who made it and when and where and the result found.

Interrogatory No. 14: Was any survey or inspection of the shipment of flour made at all by anyone other than at the premises of the Libelant on March 6, 1946? If your answer is in the affirmative please advise in detail who, when and where made and set forth a copy, or if oral set forth the details and findings.

Interrogatory No. 15: Was an inspection or report on this shipment made by the Brazilian Customs authorities at the time of discharge or at any time thereafter? If not, state why not? If such inspection was made please furnish a copy or set forth the findings in such inspection or a report by or for the Brazilian Customs authorities.

Interrogatory No. 16: State the invoice value of

the shipments of flour in detail as to price per bag.

Interrogatory No. 17: State the market value of the shipments of flour as to price per bag at Rio de Janeiro.

Interrogatory No. 18: State how the alleged damage of \$10,000.00 as set forth in the Libel is determined and arrived at as the alleged measure of Libelant's damage.

/s/ J. CHARLES DENNIS,
United States Attorney.

BOGLE, BOGLE & GATES,
/s/ CLAUDE E. WAKEFIELD,
Of Counsel, Proctors for the
Respondent.

[Endorsed]: Filed November 15, 1947.

[Title of District Court and Cause.]

ORDER UPON EXCEPTIONS OF LIBELANT
TO ANSWER OF RESPONDENT

Libelant's exceptions to respondents answer having duly and regularly come on for hearing upon the 24th day of November, 1947, the undersigned Judge presiding; the court having considered the same, and argument of opposing counsel relative thereto, but having reserved his ruling to allow respondent's proctors time within which to obtain further investi-

gation to enable amendment of said answer; and it now appearing from statements of proctors of record that an agreement has been reached upon the amendment of said answer:

Now, Therefore, it is hereby Ordered as follows:

(1) That libelant's exceptions to the first affirmative defense of respondent's answer are sustained;

(2) That respondent is allowed until December 24, 1947, within which to amend the allegations of said first affirmative defense of the answer to set forth the specific exceptions, if any, of the bill of lading or the Carriage of Goods by Sea Act upon which it relies.

Done in open court this 1st day of December, 1947.

/s/ JOHN C. BOWEN,
U. S. District Judge.

Presented by:

/s/ CHARLES B. HOWARD,
Of Proctors for Libelant.

Approved as to form:

/s/ J. CHARLES DENNIS,
U. S. Atty.

BOGLE, BOGLE & GATES,

/s/ CLAUDE E. WAKEFIELD,
Of Counsel.

[Endorsed]: Filed Dec. 1, 1947.

[Title of District Court and Cause.]

LIBELANT'S ANSWERS TO RESPONDENT'S
INTERROGATORIES

Comes now the libelant and pursuant to order of the court entered herein on December 1, 1947, makes the following answers in writing and under oath to respondent's interrogatories propounded to libelant on November 15, 1947.

I.

Interrogatory No. 2. Cargo was discharged into wagons.

II.

Interrogatory No. 3(a). Wagons were furnished by the port administration.

(b) See answer to (a) above.

(c) Open type, covered with heavy waterproof tarpaulins.

III.

Interrogatory No. 4. March 2, 1946.

IV.

Interrogatory No. 5. Shipment was carried directly from point of discharge to consignee's premises in wagons. It did not pass through custom's warehouse.

V.

Interrogatory No. 7. See answer to Interrogatory No. 5 in paragraph IV above. There was no delay en route in delivering the shipment to consignee's warehouse.

VI.

Interrogatory No. 8. Shipment was surveyed on March 6, 1946, at consignor's premises by Cia Imobiliaria Financeira Americana, S. A.

VII.

Interrogatory No. 9. Consignee filed written notice of claim for damage to shipment with carrier at Rio de Janeiro on March 2, 1946.

VIII.

Interrogatory No. 10. Copy of letter of March 2, 1946, is attached hereto as Exhibit "A."

IX.

Interrogatory No. 11. 3087 bags of wheat flour were found partly spoiled by salt water. Depreciation 40%. Chemical analysis of samples of wheat flour showed presence of salt water. There was a leakage of contents in 197 bags resulting in a net shortage of 880 kos. of flour.

X.

Interrogatory No. 12. Not so far as is known at the present time.

XI.

Interrogatory No. 16. \$4.75 U. S. per bag.

XII.

Interrogatory No. 17. Sound market value at Rio de Janeiro, duty paid, of each bag of American wheat flour weighing 50 kg. as of date of discharge

was Cruzeiros 126.00, which at the then prevailing rate of currency exchange would be \$6.62 U. S. funds per bag.

XIII.

Interrogatory No. 18. Libelant's claim is now computed in the total amount of \$8,428.24, U. S. funds, which is arrived at as follows:

3087 bags wheat flour found partly spoiled by salt water—@ \$6.61½ U. S. per bag (Cruzeiros 126.00 x \$.0525 U. S. exchange rate) Sound arrived value . . .	\$20,420.51 U. S.
Loss by depreciation 40%	\$8,168.20 U. S.
197 bags sustained leakage of con- tents resulting in shortage of 880 kilos @ \$.1324 U. S. per kilo	116.51 U. S.
Survey fees, bank charges and set- tling expenses	143.53 U. S.
	<hr/>
	\$8,428.24 U. S.

MERRITT, SUMMERS &
BUCEY,

/s/ CHARLES B. HOWARD,
Proctors for Libelant.

EXHIBIT "A"

Rio de Janeiro, 2 de Marco de 1946.

A

MOORE McCORMACK (NAVEGACAO) S. A.

Praco Maua, 7 - 7°and.

Rio de Janeiro

Prezados Senhores.

Ref.: 10.500 sacos com 525.000 ks de farinha
embarcados em New York no vapor
"Sweepstakes," conforme conhecimen-
tos datados de 31-1046.

Tendo notado uma certa quantidade de sacos
rasgados com perda de conteudo, e outros tantos
molhados, na descarga da farinha em referencia,
avisamos a VV.SS. que responsabilizamos os arma-
dores do vapor, como transportadores, pelas refer-
idas avarias.

Sem mais, subscrevemo-nos com elevada estima
e consideracao,

De VV.SS.

Amos, Atos e Obrdos

COMPANHIA LUZ STEARICA

Sec.Moinho da Luz

Director.

H/FJ.

Duly verified.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 10, 1948.

[Title of District Court and Cause.]

LIBELANT'S MOTION TO REQUIRE
RESPONDENT TO PRODUCE

Comes now the libelant above named and, pursuant to Admiralty Rule 32, moves the court for an order directed to the respondent herein requiring the production at a time and place to be specified by the court of the following:

(1) Any and all smooth deck log books for the S.S. "Sweepstakes" for voyages and periods between and including December, 1945, and March, 1946, which have not already been identified and attached as exhibits to depositions of ship's officers taken on behalf of respondent.

(2) Any and all rough deck log books for the S.S. "Sweepstakes" for the voyages and periods between and including December, 1945, and March, 1946.

(3) Originals and/or available copies of any and all dock receipts issued by respondent, its agent, Moore-McCormack Lines, Inc., or any other agent, employee or representative of respondent at the port of New York covering shipment of wheat flour aboard the S.S. "Sweepstakes" consigned to libelant, Cia. Luz Stearica as referred to in the libel.

(4) Any and all executed copies of bills of lading issued by respondent or its agent, Moore-McCormack Lines, Inc., covering the shipment of wheat flour aboard the S.S. "Sweepstakes" consigned to

libelant Cia. Luz Stearica and any other copies of the bills of lading issued on the above shipment in the possession of respondent, its agents or employees, which contain any notation or endorsement as to condition of the flour in said shipment at time of loading or discharging.

(5) Any report, memorandum or written record made by or to respondent or its agent, Moore-McCormack Lines, Inc., or other employee or agent of respondent in the regular course of business relative to the condition of, or any damage observed on, the shipment of wheat flour consigned to libelant Cia. Luz Stearica, as referred to in the libel, either at port of loading or at port of discharge.

(6) Any and all carbon copies of hatch tallies for the shipment of flour consigned to libelant Cia. Luz Stearica, which are reported to have been delivered by the chief officer of the S.S. "Sweepstakes" to stevedore foreman or representative or employee of respondent or its agent, Moore-McCormack Lines, Inc., at the port of Rio de Janeiro.

(7) Any and all written receipts or similar documents obtained by respondent or its agent, Moore-McCormack Lines, Inc., from the libelant or its representatives upon discharge and delivery of the shipment of wheat flour from the S.S. "Sweepstakes" to libelant at the port of Rio de Janeiro.

(8) Any written report made by the master, first mate, purser, or other officer aboard the S.S. "Sweepstakes" to respondent or its agent,

Moore-McCormack Lines, Inc., in the regular course of business relative to the condition of the shipment of wheat flour consigned to Cia. Luz Stearica, as referred to in the libel, either at the port of loading or discharge.

(9) Any written report of survey or analysis secured by respondent as to the condition of the shipment of wheat flour consigned to Cia. Luz Stearica as referred to in the libel, either at the port of New York or at the port of Rio de Janeiro.

This motion is based upon the files and records herein and upon the affidavit attached hereto.

MERRITT, SUMMERS &
BUCEY,

/s/ CHARLES B. HOWARD,
Proctors for Libellant.

Duly verified.

[Endorsed]: Filed March 9, 1949.

[Title of District Court and Cause.]

ORDER ON LIBELANT'S MOTION TO RE-
QUIRE RESPONDENT TO PRODUCE
DOCUMENTS

It appearing that libelant moved the Court for an order requiring respondent to produce certain documents under Supreme Court Admiralty Rule 32, and that said motion was regularly noted for hearing on March 14, 1949, before the undersigned judge of the above-entitled court; and

It further appearing that the proctors for libelant and respondent have agreed upon the production of documents as set forth in said motion, and the Court being otherwise fully advised in the premises; now, therefore,

It Is Hereby Ordered that respondent shall be, and it is hereby required to produce all of the documents specified in sub-paragraphs 1 through 9 of said motion which may now be in the possession of respondent, its agents, employees or proctors, except only those documents which may have already been offered and identified as exhibits to depositions of ship's officers taken on behalf of respondent; and, it is further

Ordered that respondent shall produce the aforementioned documents at the office of its proctors, Messrs. Bogle, Bogle and Gates, Central Building, Seattle, Washington, during the week of March 14, 1949, as agreed upon by counsel for the respective parties, and that any documents not then available

to proctors for respondent shall be produced and made available to proctors for libelant for inspection promptly upon receipt thereof.

Done in Open Court, this 14th day of March, 1949.

/s/ JOHN C. BOWEN,
Judge.

Approved by:

BOGLE, BOGLE & GATES,
/s/ CLAUDE E. WAKEFIELD,
Proctors for Respondent.

Presented by:

MERRITT, SUMMERS &
BUCEY,
/s/ CHARLES B. HOWARD,
Proctors for Libelant.

[Endorsed]: Filed March 14, 1949.

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above-entitled cause having come on regularly for trial in the above-entitled court before the undersigned judge thereof, on October 28, 1949, and having been continued from time to time and concluded on November 5, 1949; libelant appearing by Charles B. Howard of its proctors, and respondent

appearing by Claude E. Wakefield and Bayard Crutcher of its proctors; and the court having duly considered the evidence and exhibits submitted by the respective parties and the arguments of counsel for the respective parties, together with the trial briefs and memoranda of authorities filed by each of the parties, and being fully advised in the premises and having orally announced its decision thereon; does now make the following

Findings of Fact

I.

That libellant is and during all times hereinafter mentioned was a corporation duly organized, created and existing under and by virtue of the laws of the Republic of Brazil, with an office and place of business at Rio de Janeiro, Brazil.

II.

That respondent, United States of America, is and during all times hereinafter mentioned has been a sovereign corporation and was the owner of that certain steamship known as the "Sweepstakes." That in 1946 the steamship "Sweepstakes" was employed and operated by the respondent, United States of America, as a merchant vessel in the common carriage of merchandise for hire between the ports of New York and Rio de Janeiro, among others. That at the time of commencement of this action said vessel was afloat on navigable waters within the territorial jurisdiction of the United

States and within the admiralty and maritime jurisdiction of the above-entitled court, being in the port of Seattle, Washington.

III.

That if the steamship "Sweepstakes" were privately owned or operated, a proceeding in admiralty in rem against her and in personam against her owner could be maintained by libelant. That libelant did elect to proceed against respondent, United States of America, upon the principles both of a libel in personam and of a libel in rem. That the respondent, United States of America, as a sovereign corporation, has given its consent to be sued by reason of the provisions and terms of that act commonly known as the Suits in Admiralty Act and/or the Public Vessels Act, 46 U.S.C. §§741 to 752, and 46 U.S.C. §§781 to 790.

IV.

That on or about the 31st day of January, 1946, International Milling Company delivered to the steamship "Sweepstakes" and to respondent at the port of New York a total of 10,500 bags of wheat flour, each containing a quantity of 50 kilograms, which flour was accepted by respondent under the terms of two certain bills of lading identified as bills of lading No. 37 and No. 74. That respondent accepted said flour and agreed to carry the same as a common carrier on the said steamship "Sweepstakes" from the port of New York to the port of Rio de Janiero, to be delivered, in like good order

and condition as when shipped, to the order of said shipper, in consideration of agreed freight moneys which were paid.

V.

That libelant had legal title to the aforesaid shipment of flour and is the sole owner of the right to sue and recover thereon and is entitled to maintain this action against the respondent for the damages sustained to the flour in this ship—as covered by bills of lading No. 37 and No. 74.

VI.

That at the time of delivery to and receipt of said 10,500 bags of flour by the respondent, said flour was in apparent good order and condition and was in fact in actual good order and condition. That said flour was loaded and stowed by respondent on board the steamship “Sweepstakes” which thereafter sailed from the port of New York and subsequently arrived at the port of Rio de Janeiro on or about February 20, 1946, where the respondent and the said steamship “Sweepstakes” discharged and delivered the flour in bad order by reason of its being damaged, destroyed and a portion thereof rendered wholly valueless.

VII.

That the bad order and damage to the aforesaid flour shipment at the port of Rio de Janeiro, Brazil, was in the nature of sea water damage to said flour caused during the voyage and before discharge, and while in the custody of the respondent as carrier.

That the sole proximate cause of the aforesaid damage was the negligence of the respondent, as carrier, in the improper care of said flour while in transit aboard the S.S. "Sweepstakes" and in negligently permitting the said flour to be contacted with salt water while aboard the vessel. That there was no excuse for such negligence, nor were there any conditions or circumstances excusing or relieving the respondent from liability to the libellant for damage caused to said flour by reason of such negligence.

VIII.

That a total of 3,087 bags of the aforesaid flour were extensively damaged due to wetting caused by salt water contact with the flour while aboard the S.S. "Sweepstakes" in the custody of the respondent carrier. That upon the basis of laboratory analysis and inspection by a competent chemist and by an experienced marine surveyor the damage to the 3,087 bags of flour is determined to be 35% per bag of its sound market value at destination. That there was no salvage obtained or obtainable from that portion of flour which was damaged as aforesaid.

IX.

That the sound market value of each 50-kilogram bag of flour at the port of Rio de Janeiro at the time of arrival and delivery of this shipment, according to the testimony of a qualified witness, was 137 cruzeiros, Brazilian funds. That libellant in its answers to interrogatories prior to trial had stated

the sound market value of each such bag of flour at the aforesaid time and place as 126 cruzeiros, Brazilian funds, and libelant has agreed to waive its right to recovery of any sum in excess of the sound market value so stated in its answers to interrogatories. That at the prevailing rate of exchange the sound market value of each 50-kilogram bag of flour was and is \$6.27, U. S. funds. That 35% depreciation to 3,087 bags of the aforesaid shipment of flour as of time of arrival at destination was and is the sum of \$6,774.42, U. S. funds. That the sum of \$6,774.42 represents the difference between the value of the said flour had it arrived at the port of destination in good order and condition and the value of said shipment of flour as it arrived, was discharged and delivered in a damaged condition at the port of destination, all due to respondent's fault and negligence as hereinabove stated.

X.

That after discharge of said flour from the steamship "Sweepstakes" at the port of Rio de Janeiro and delivery to the consignee, due and timely notice of the damage sustained to the shipment of flour was given by the libelant to the agent for respondent carrier at Rio de Janeiro by letter of March 2, 1946. That by such letter respondent and its agent at Rio de Janeiro had a full and complete opportunity to examine, test and analyze the damaged portions of the above shipment of flour after receipt of the aforesaid notice of damage from the libelant.

XI.

That libelant has fully performed all the conditions of the contract of carriage.

XII.

That this proceeding is within the admiralty and maritime jurisdiction of the United States and within the jurisdiction of this court sitting in admiralty.

To the foregoing respondent excepts and its exception is allowed.

Done in open court this 14th day of November, 1949.

/s/ JOHN C. BOWEN,
U. S. District Judge.

Based upon the foregoing Findings of Fact the court now makes the following

Conclusions of Law

I.

That respondent was negligent in the stowage, care and custody of the cargo while in transit from the port of New York to Rio de Janeiro and that said negligence of the respondent was the sole and proximate cause of the 35% depreciation in value of the 3,087 bags of flour in the shipment and damage to the libelant herein.

II.

That libelant is entitled to a decree herein against

respondent in the sum of \$6,774.42, together with interest thereon at 4% per annum from November 14, 1949, and for its costs herein to be taxed.

To the foregoing respondent excepts and its exception is allowed.

Done in open court this 14th day of November, 1949.

/s/ JOHN C. BOWEN,
U. S. District Judge.

Presented by:

/s/ CHARLES B. HOWARD,
Of Proctors for Libelant.

Approved as to form:

J. CHARLES DENNIS,
U. S. Attorney.

BOGLE, BOGLE & GATES,
Proctors for Respondent.

Receipt of copy acknowledged.

[Endorsed]: Filed November 14, 1949.

In the United States District Court for the Western
District of Washington, Northern Division

In Admiralty No. 15036

CIA. LUZ STEARICA, a Corporation,
Libelant,

vs.

UNITED STATES OF AMERICA,
Respondent.

DECREE

The above-entitled cause having come on regularly for trial in the above-entitled court before the undersigned judge thereof on October 28, 1949, and having been continued from time to time and concluded on November 5, 1949; libelant appearing by Charles B. Howard of its proctors, and respondent appearing by Claude E. Wakefield and Bayard Crutcher of its proctors; and the court having duly considered the evidence and exhibits submitted by the respective parties and the arguments of counsel submitted for the respective parties, together with trial briefs and memoranda of authorities filed by each of the parties, and being fully advised in the premises and having orally announced its decision thereon, and having entered herein its Findings of Fact and Conclusions of Law;

Now, therefore, in accordance therewith, it is Ordered, Adjudged and Decreed that libelant have and recover herein from respondent the sum of

\$6,774.42, together with interest thereon at 4% per annum from November 14, 1949, and costs herein taxed in the sum of \$239.63.

To the foregoing respondent excepts and its exception is allowed.

/s/ JOHN C. BOWEN,
U. S. District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed Nov. 14, 1949.

[Title of District Court and Cause.]

PETITION FOR APPEAL

To the Honorable Judges of the Above-Entitled Court:

Respondent, United States of America, in the above-entitled cause, by and through J. Charles Dennis, United States Attorney for the Western District of Washington, and Bogle, Bogle & Gates and Claude E. Wakefield and M. Bayard Crutcher, of Counsel to the said United States Attorney, being aggrieved by that certain final order, to wit, the judgment and decree filed and entered in the above cause on November 14, 1949, hereby claims an appeal therefrom and from the whole thereof, to the United States Court of Appeals for the Ninth Circuit, and prays that such appeal be allowed forthwith.

Dated this 13th day of February, 1950.

J. CHARLES DENNIS,
United States Attorney.

BOGLE, BOGLE & GATES,
CLAUDE E. WAKEFIELD,
/s/ M. BAYARD CRUTCHER,
Of Counsel.

Receipt of copy acknowledged.

[Endorsed]: Filed February 13, 1950.

[Title of District Court and Cause.]

ORDER GRANTING PETITION FOR APPEAL

The above-entitled cause having duly and regularly come on for hearing before the above-entitled court, the undersigned Judge presiding, upon petition for appeal of respondent United States of America duly presented to this court, together with the said respondent's assignment of errors heretofore filed with the Clerk of this court, and the court having considered the same; now, therefore,

It Is Hereby Ordered that an appeal to the United States Court of Appeals for the Ninth Circuit from the judgment and decree heretofore entered and filed on the 14th day of November, 1949, in the above-entitled cause, be and the same is hereby allowed.

It Is Further Ordered that the respondent United

States of America is not required to file cost and supersedeas bond on appeal, and that stay of execution is hereby entered and granted.

Done In Open Court this 13th day of February, 1950.

/s/ JOHN C. BOWEN,
United States District Judge.

Presented by:

/s/ M. BAYARD CRUTCHER,
Of Counsel to the
United States Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed Feb. 13, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the United States of America, respondent above named, hereby appeals to the Court of Appeals for the Ninth Circuit from each and every part of the final judgment and decree entered in this cause on November 14, 1949, as more fully set forth in said respondent's assignments of error filed herewith.

Dated this 13th day of February, 1950.

/s/ J. CHARLES DENNIS,
United States Attorney.

BOGLE, BOGLE & GATES,
/s/ CLAUDE E. WAKEFIELD,
/s/ M. BAYARD CRUTCHER,
Of Counsel.

Receipt of copy acknowledged.

[Endorsed]: Filed February 13, 1950.

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS BY RESPOND-
ENT UNITED STATES OF AMERICA

Respondent, United States of America, hereby assigns error in the trial and proceedings before the Court and in the Findings of Fact and Conclusions of Law and Judgment and Decree entered and filed on the 14th day of November, 1949, as follows:

1. That the Court erred in finding that the libelant's shipment of flour was delivered by respondent to libelant at Rio de Janeiro in a damaged condition. (Findings of Fact 6, 7 and 8.)

2. That the Court erred in finding that said shipment of flour was damaged by sea water at the time of discharge from the vessel and when delivered to libelant. (Findings of Fact 7 and 8.)

3. That the Court erred in finding that any damage to said flour by sea water or damage from any other cause was proximately caused by respondent's negligence or improper care of said cargo, or was caused by respondent at all. (Findings of Fact 7 and 8.)

4. That the Court erred in finding that there was a competent or sufficient chemical analysis of said damaged flour as a basis for a determination of salt water contamination. (Findings of Fact 8.)

5. That the Court erred in finding that there was a competent or sufficient survey, testing, sampling

or analysis of damage to said flour on the basis of chemical analysis, testing or sampling to establish a loss or damage of 35% of the sound market value of the contents of each bag, or in finding that there was any competent or sufficient evidence of any other percentage, measure or extent of loss or damage whatsoever. (Findings of Fact 8 and 9.)

6. That the Court erred in finding that there was no salvage obtained or obtainable from the damaged flour. (Finding of Fact 8.)

7. That the Court erred in finding that the sound market value of flour at the port of Rio de Janeiro at the time of delivery to libelant was 137 Cruzeiros or 126 Cruzeiros, or in finding that there was any competent or sufficient evidence of sound market value of said flour. (Finding of Fact 9.)

8. That the Court erred in finding that the difference between the sound market value and the value of the alleged damaged flour was \$6,774.42 or any sum whatsoever. (Finding of Fact 9.)

9. That the Court erred in finding that libelant gave respondent sufficient notice of damage or claim and in finding that respondent was afforded sufficient or any opportunity to survey, test, sample or analyze the alleged damaged flour. (Finding of Fact 10.)

10. That the Court erred in rejecting respondent's evidence of condition and seaworthiness of respondent's vessel "Sweepstakes" as to prior and subsequent voyages of the vessel, and north-bound

on the same voyage in respect of showing no sea water damage or other damage to any cargo on such voyages; that there were no leaks and no repairs were made to the vessel, all as bearing upon the issue of the possibility of sea water damage on the voyage in question.

That libelant objected to said testimony as follows:

“Mr. Howard: At this point I object to that question. It is a question directed to the Master of this vessel interrogating him as to claims for damage to sugar carried on a previous voyage. I submit whether or not they had any claims for damage on a previous voyage had no bearing on the claim made by libelant in the present case. Before Your Honor rules on that I would like an opportunity to cite authorities I have on that question.” (Typewritten transcript, p. 111.)

“Mr. Howard: I object to this question and the next three questions following on the same grounds as stated this morning, that is, that this now relates to a subsequent voyage and not the voyage in question. I submit that any evidence of cargo or damage, if any, that may have been sustained to cargo on a subsequent voyage would not be admissible for the same reason that evidence of damage on a prior voyage would not be admissible.” (Typewritten transcript, p. 140.)

That the court sustained said objections and excluded said evidence and all subsequently offered evidence on the same issue. (Typewritten transcript, pp. 113, 115, 116, 118, 119, 120, 154.)

That respondent made due and proper offers of proof in substance as follows:

That on the preceding voyages of this vessel to European and South American ports and return to New York and upon return to New York on the northbound voyage in question, and on the subsequent voyage to South America, there was no evidence of leakage of the hull or decks or at all, or of any water, sea water or moisture damage to cargo from any source or cause. (Typewritten transcript, pp. 114, 116, 118, 120, 154.)

11. That the Court erred in making and entering Conclusions of Law 1 and 2 in that there was no proof or sufficient proof——

(a) That respondent was responsible or liable for any damage;

(b) That respondent was negligent in any respect;

(c) That the damage was 35% or any other percentage or measure of damage;

(d) That the sound value of the flour, less damaged value was \$6,774.42 or any other ascertainable sum;

(e) That the evidence was insufficient to establish respondent's liability at all and was insufficient to establish any basis of damage as to the extent thereof or the value thereof.

12. That the Court erred in entering a Final Decree on November 14, 1949, in favor of libelant in the sum of \$6,774.42 plus interest and costs, or in any other sum, in that under the evidence before the Court and the evidence improperly excluded by the Court, libelant failed to prove its case and Decree should have been entered in favor of respondent dismissing the libel and awarding respondent its costs.

/s/ J. CHARLES DENNIS,
United States Attorney.

BOGLE, BOGLE & GATES,
/s/ CLAUDE E. WAKEFIELD,
/s/ M. BAYARD CRUTCHER,
Of Counsel.

Receipt of copy acknowledged.

[Endorsed]: Filed February 13, 1950.

[Title of District Court and Cause.]

CITATION ON APPEAL

The President of the United States to the Above-Named Libelant, Cia Luz Stearica, a Corporation,

Greetings:

You are hereby notified that in that certain cause in Admiralty in the United States District Court for the Western District of Washington, Northern Division, as entitled above, wherein Cia Luz Stear-

ica, a corporation, is libelant, and the United States of America is respondent, an appeal has been allowed by order of this court to the United States Court of Appeals for the Ninth Circuit, upon the petition of the respondent therefor.

You are hereby cited and admonished to be and appear in the United States Court of Appeals for the Ninth Circuit in San Francisco, in the State of California, within forty (40) days from the date of this citation pursuant to an appeal allowed in the above-entitled cause on the 13th day of February, 1950, to show cause, if any there be, why the final decree as entered in the above-entitled cause, upon such appeal above mentioned, should not be corrected and speedy justice should not be done in that behalf.

Witness the Honorable John C. Bowen, Judge of the United States District Court for the Western District of Washington, this 13th day of February, 1950.

[Seal] /s/ JOHN C. BOWEN,
United States District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed Feb. 13, 1950.

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 15036

CIA. LUZ STEARICA, a Corporation,
Libelant,

vs.

UNITED STATES OF AMERICA,
Respondent.

Before: The Honorable John C. Bowen,
District Judge.

TRANSCRIPT OF PROCEEDINGS
AT TRIAL

October 28, 1949

Proctors:

MERRITT, SUMMERS & BUCEY and
CHARLES B. HOWARD,

For Libelant.

J. CHARLES DENNIS,
United States Attorney, for Respondent.

BOGLE, BOGLE & GATES,
CLAUDE E. WAKEFIELD and
M. BAYARD CRUTCHER,
Of Counsel.

Whereupon, opening statements having been made by counsel for libelant and counsel for respondent, the following proceedings were had and done, to wit:

The Court: The Court will now hear the first witness.

Mr. Howard: At this time, if the Court please, pursuant to the stipulation with counsel for respondent I have already referred to, dated September 8, 1948, I would like to have marked the two bills of lading.

(Bills of lading marked Libelant's Exhibit 1 for Identification.)

Mr. Howard: I offer those two bills of lading in evidence now, pursuant to that stipulation.

The Court: Is there any objection? [2*]

Mr. Howard: If the Court please, I can read the stipulation while counsel is examining the bills of lading.

After giving the title of the case, "It is hereby Stipulated by and between Merritt, Summers & Bucey, proctors for libelant, and Bogle, Bogle & Gates, of proctors for respondent, that executed copies of Bills of Lading No. 37 and No. 74 on the S.S. "Sweepstakes" dated January 31, 1948, and containing endorsements of the National City Bank of New York, International Milling Co., and Companhia Luz Stearica on each of said copies, may be introduced in evidence as exhibits by libelant at time of trial of the above cause, without further identification or necessity of further proof as to

* Page numbering appearing at bottom of page of original Reporter's Transcript.

authenticity. It is further stipulated that the admission of said executed copies of Bills of Lading No. 37 and No. 74 will constitute sufficient proof of the libelant's ownership of the shipments of flour covered by each of said bills of lading and that respondent waives the requirement of any further proof by libelant to establish libelant's legal title to the shipments of flour and capacity or right to maintain this action against respondent for alleged damages to said flour shipments.

"Dated at Seattle, Washington, this 8th day of September, 1948."

It is signed by myself, Merritt, Summers & Bucey, and by Mr. Wakefield, Bogle, Bogle & Gates.

Mr. Wakefield: There is no objection to Libelant's Exhibit 1, Your Honor.

The Court: It is now admitted.

(Libelant's Exhibit 1 received in evidence.)

Mr. Howard: I would like to call Your Honor's attention at this time to the fact that one of those bills of lading covers 6000 50 kilo bags of flour, and the other bill of lading covers 4500 50 kilo bags of the same brand of flour. [4]

* * *

Mr. Howard: Libelant next calls on the deposition of Anthony Parsons, portions of which we would like to read.

Mr. Wakefield: If the Court please, before the deposition is read I would like to state for the record that this witness is a witness called by the respondent and not the libelant.

The Court: Do you adopt the testimony and call the witness whose deposition was taken as your witness?

Mr. Howard: Yes, Your Honor, insofar as that portion of the deposition which I desire to read.

Mr. Wakefield: I object to reading any portions. If he is going to produce the deposition, I think he should read the whole deposition.

The Court: It would not hurt if you advised the Court of the authorities touching your respective contentions. I imagine you have a lot of authorities to support your position, do you not?

Mr. Howard: I can advise Your Honor of my position. 26 C.J.S. on depositions, Sec. 89: "A deposition which [5] has been properly taken and filed and which contains relevant and competent evidence may, in the discretion of the court, be admitted in evidence at any stage of the trial."

Sec. 91: "As a general rule a party who introduces a deposition in evidence need not read all of it, at least where it was taken by his adversary; and the opposing party may introduce all or any part of the remainder. * * * Nearly all the authorities agree that a party using a deposition taken by his adversary may introduce only such part of it as relates to the issue on which it is offered, and it has been held that, by so doing, he does not make the deponent his own witness. The taker may then put in evidence any part not already introduced."

In support of those statements in C.J.S., I can cite to Your Honor a case in the Circuit Court for

the Third Circuit, a 1924 case, 2 F. (2) 322, and an Eighth Circuit case, 169 F. 593.

From the Third Circuit Court opinion: “* * * whether the plaintiff may use a deposition taken by his adversary and introduce only such parts of it as he may desire, leaving to the defendants, on whose behalf the deposition was taken, the right to put the remainder in evidence,” was a question raised and decided. That [6] was decided in favor of the plaintiff on that point, and that case was then cited in the later case.

The statement I have on that is as follows: “In the course of the trial, the defendant was permitted to read in evidence a portion of each of four depositions taken by the plaintiff, but not used by her, the plaintiff objecting in each instance that it was not admissible to read a part only of a deposition, and that the portion read did not include all bearing upon the same subject. * * * There is some diversity of opinion among the courts upon this question of practice, but the prevailing and better opinion is that there is no sound objection to the reading of a part only of a deposition, if what is read does not consist of mere fragmentary excerpts, a correct appreciation of which depends upon the context, and the opposite party be left at liberty to read what is omitted.”

The Court: I will hear opposing counsel.

Mr. Wakefield: I don't find any objection to counsel's law, but the fact is that what he read from C.J.S. was to the effect that he may use this deposition as relating to a specific issue. He has not

specified what issue he is going to prove, or what issue the testimony he is now seeking to elicit from this deposition—what the purpose of it is. By reading [7] portions, as this case he last mentioned states, by reading fragmentary portions he will destroy the effect of the whole deposition. I submit we should not have our deposition and our proof jeopardized or lessened in force by counsel going through and picking out fragmentary portions.

The Court: If it is fragmentary, it will not come within the rules, is that your position?

Mr. Howard: That is the way one court has so described it. I advise the Court that it is not my intention to read fragmentary portions of the deposition.

The Court: Are you willing to state upon what issues you offer the deposition as bearing?

Mr. Howard: Yes, Your Honor. I am taking this in chronological order, and the testimony I propose to read would be on the question of the delivery of the cargo to the vessel in good condition at the Port of New York.

The Court: You may do that. Counsel opposing may have the right to read the remainder of the deposition not read by libelant's counsel without making the deponent the witness of respondent.

DEPOSITION OF ANTHONY PARSONS

(Mr. Lord appearing for respondent, Mr. Prem appearing for libelant.)

Direct Examination

“By Mr. Lord: [8]

Q. How long have you been going to sea, Mr. Parsons? A. Since 1937.

Q. What papers do you hold?

A. Master's license.

Q. You are now sailing on a vessel of Moore-McCormack?

A. Yes, chief mate on the Mormacoak.

Q. When did you obtain your chief mate's papers? A. About 1943.

Q. And you sailed continuously from that time as chief mate?

A. Yes, after obtaining my sailing license as chief mate.

Q. Were you chief mate on the Sweepstakes on a voyage from New York to South American ports in January, 1946? A. Yes.

Q. Do you recall when you joined the Sweepstakes?

A. I joined her about January 31st, I believe.

Q. Where was she then?

A. She was over at Pier 32.

Q. Was she then loading cargo?

A. Loading cargo, yes.

* * *

(Deposition of Anthony Parsons.)

Q. Did you know that wheat was loaded into the Sweepstakes on this voyage?

A. Well, I recall its being loaded while I was——[9]

Mr. Prem: This is flour.

Mr. Lord: Wheat flour.

A. (Continuing): Flour was loaded at Pier 32 while I was on board the ship.

Q. Do you recall where the flour was stowed in the vessel?

A. According to the cargo plan it was stowed in Nos. 1, 2, 3 and 4 in the tween decks, and I believe lower tween deck in No. 4. May I see the cargo plan?

(Witness is handed the cargo plan.)

Q. (Continuing, referring to plan): Yes, that is correct. That is top stowage or special stowage for easy discharge upon arrival at Rio.

Q. Have you made any investigation to determine whether or not libellant's shipments, which were marked "C L S" were loaded before or after you joined the Sweepstakes?

A. Well, I checked the hatch data and I see that some cargo, a lot of it had been loaded prior to my joining. The majority was loaded after.

Q. You mean by a lot a single lot—is that what I understand? A. A lot of it, a part of it.

Q. Do you recall the approximate number of bags that were loaded before you joined the Sweepstakes?

(Deposition of Anthony Parsons.)

A. Not unless I looked at the hatch tallies, I don't [10] recall the figures.

Q. I show you a number of slips of paper and ask you to identify these for us.

A. They are the hatch tallies of the Sweepstakes for wheat flour.

Q. Do those hatch tallies give the dates when the various lots of cargo were loaded on board the vessel?

A. Yes, they have the date on the top of the page.

Q. Will you tell us if you can from examining those hatch tallies what, if any, flour was loaded on the Sweepstakes prior to January 31, 1946?

A. On the 28th, 1965 bags loaded aboard marked "C L S."

Q. Was the balance of the bags loaded after you joined the vessel?

A. They were loaded after, yes.

Q. When you came aboard the Sweepstakes, chief, what, if any, inspection did you make of the vessel?

A. Well, it is customary when joining your vessel to inspect the whole vessel as thoroughly as possible and since she was loading at the time I inspected the cargo gear and hatches to see how the loading was progressing.

Q. Did you have an opportunity to look into the hatches where the wheat flour was being loaded?

A. Yes, I inspected all the hatches, went down in all the hatches. [11]

(Deposition of Anthony Parsons.)

Q. What was the result of such inspections?

A. As far as I can recall everything appeared in order, ample dunnage was laid and the cargo seemed to be coming aboard in good condition and being properly stowed at the time.

Q. Did you find any moisture or dampness or water in the hatches at that time?

A. No, there was no indication of that.

* * *

Q. Now, chief, did you undertake any detailed inspection of the bags of wheat flour as they came aboard?

A. No, we don't check in detail, we just watch them coming aboard, see if they appear all right, no torn bags, and the outward appearance is good.

Q. Then you did not observe any external obvious damage to this wheat flour?

A. No, it seemed to come aboard in good condition. We didn't check it any further.

Q. Did you lift or feel any bags of wheat at this time? A. No."

Mr. Howard: I would like to have the hatch tallies, the dock receipts which were referred to in this testimony marked for identification as exhibits for the libelant. [12]

Mr. Wakefield: I have here, Your Honor, and will hand to the bailiff nine sheets marked Respondent's Exhibit C for Identification, bearing date of January 5, 1949, as the date of the deposition.

The Court: Do you ask the clerk to mark these?

Mr. Howard: Yes, Your Honor.

(Hatch tallies marked Libelant's Exhibit 2 for Identification.)

The Court: Will you repeat the name given them by counsel offering them?

Mr. Howard: Hatch tallies. I offer those in evidence, Your Honor.

Mr. Wakefield: No objection.

The Court: That exhibit is now admitted, consisting of several sheets of such tallies.

(Libelant's Exhibit 2 received in evidence.)

Mr. Howard: That is all that the libelant will read from the Parsons deposition.

The next witness to be called by deposition, if the Court please, is Izaias Luiz.

The Court: All depositions received by the clerk in this case are now published.

DEPOSITION OF IZAIAS LUIZ

Direct Examination

"No. 1. Please state your name, age, nationality, [13] and where you now live and reside.

First—To the First Interrogatory he says:

Izaias Luiz, 28 years, Brazilian, Rua Marcos Sete, No. 2, Santissima, Rio de Janeiro, Federal District, Brazil.

No. 2. State by whom, where and in what capacity you were employed in February and March, 1946.

(Deposition of Izaias Luiz.)

Second—To the Second Interrogatory he says:

I was and am employed by the Port Administration, Rio de Janeiro, as checker.

No. 3. State for how long you were employed in the above capacity; also, whether you are still employed by the same concern.

Third—To the Third Interrogatory he says:

In 1946 I had been employed for two years and am still employed in the same capacity at present.

No. 4. State the duties of such employment and what qualifications you have for such position by previous experience, i.e., duties of employment and what experience you have had in performing your duties.

Fourth—To the Fourth Interrogatory he says:

In cases when shipments go into the customshouse I verify all damage and record it. In cases where shipments are delivered directly from ship to rail car I verify only the quantity and make no examination of the condition of the goods. I have worked in the port fourteen years, first as a [14] workman unloading and loading ships. I became a checker by taking a competitive examination.

No. 5. Did you, in your capacity as truckman remove or supervise the removal of a shipment of 10,500 bags of flour from dockside ex steamer "Sweepstakes" at Rio de Janeiro on or shortly after February 20, 1946?

Fifth—To the Fifth Interrogatory he says:

I played a very small part in unloading this ship-

(Deposition of Izaias Luiz.)

ment. I supervised the removal of only part of a shipment, say a carload on the entire shipment.

No. 6. If your answer to the preceding interrogatory is in the affirmative, please state when the flour was removed from the dock.

Sixth—To the Sixth Interrogatory he says:

I don't remember exactly. The cars probably left the dock the same day they were loaded.

No. 7. Were open or covered wagons, trucks or railroad cars used in removing the above-described flour shipments?

Seventh—To the Seventh Interrogatory he says:

Open railroad cars were used and covered with canvas as soon as loaded.

No. 8. If open wagons, trucks or cars were used, please state what, if any, coverings or tarpaulins were spread over the contents and fully describe such coverings [15] as to kind, size, method of securing, and whether they were in good condition.

Eighth—To the Eighth Interrogatory he says:

The canvas was in good condition and was well secured with rope tied under the car. No rain could possibly damage the goods covered.

No. 9. Was each wagon, truck or carload securely covered with a tarpaulin?

Ninth—To the Ninth Interrogatory he says:

I saw only one wagon."

Mr. Wakefield: If the Court please, at this time I would like to move to strike the answer to the eighth interrogatory on the ground that the witness'

(Deposition of Izaias Luiz.)

answer to the ninth interrogatory clearly shows that he is unable to answer any interrogatory with respect to the condition or how the rope was tied of any car except one, because he said he saw only one wagon. I therefore submit that the eighth answer is improper.

The Court: The motion will be denied. The Court will consider it as going to the weight of the answer.

“No. 10. To what destination were the loads of flour delivered?

Tenth—To the Tenth Interrogatory he says: [16]

It was sent directly to the mill. I don't remember which mill.

No. 11. How long were such wagons, trucks or cars en route, and was there any delay involved in arrival at destination?

Eleventh—To the Eleventh Interrogatory he says:

I don't know.

No. 12. State, if you recall, whether there was any rainfall in Rio de Janeiro on the dates in 1946 when the shipment of flour described above was transported from dockside ex steamer “Sweepstakes” to another destination.

Twelfth—To the Twelfth Interrogatory he says:

I don't think it rained. No unloading is done during rain and it is doubtful if any car remained on the docks more than two hours after loading.

No. 13. State, if you know, whether said shipments of flour became dampened by penetration of

(Deposition of Izaias Luiz.)

rainwater during the period in 1946 while in transit from dockside to another destination.

Thirteenth—To the Thirteenth Interrogatory he says:

I don't know.

No. 14. Did you examine the contents of the various loads of flour when discharged from the steamer "Sweepstakes" into wagons, trucks or cars in February, 1946?

Fourteenth—To the Fourteenth Interrogatory he says: [17]

No.

* * *

No. 19. Describe the warehouse, building or area to which the shipments of flour were transported from dockside to consignee's premises.

Nineteenth—To the Nineteenth Interrogatory he says:

I don't follow the shipment to the mill. All of the mills are close to the docks.

No. 20. Was the warehouse, building or area referred to in Interrogatory No. 19 sheltered from the elements, particularly rainfall, and if so, explain fully.

Twentieth—To the Twentieth Interrogatory he says:

I have never seen these areas.

No. 21. To the best of your knowledge were the above-mentioned shipments of flour exposed to rainfall at any time after discharge from the steamer

(Deposition of Izaias Luiz.)

“Sweepstakes” up to time of delivery at the premises of Cia. Luz Stearica and explain fully.

Twenty-first—To the Twenty-first Interrogatory he says:

I don't think any part of the shipment was exposed to rain.

No. 22. Do you expect to be in the State of Washington, U.S.A., at any time during the next six months?

Twenty-second—To the Twenty-second Interrogatory he says:

“No.” [18]

Cross-Interrogatories

No. 1. Were you present and did you observe the sacks of flour as they were discharged from the ship and placed in the wagons, trucks or cars?

First—To the First Cross-Interrogatory he says:

I observed only a small part of the cargo unloaded.

No. 2. If your answer to the preceding interrogatory is that you did observe the discharge of the flour from the ship, state fully what your duties were at that time; also whether you made any inspection of the flour as it was being discharged or after it was loaded into the cars.

Second—To the Second Cross-Interrogatory he says:

I verified only the number of sacks; I did not inspect the flour.

(Deposition of Izaias Luiz.)

No. 4. If you have testified that the cars were covered with tarpaulins or other covering, state when this was done and where the cars were located at the time it was done.

Fourth—To the Fourth Cross-Interrogatory he says:

The cars were alongside the ship and were covered as soon as they were loaded.

No. 5. Give the daily movement or location of all of these cars from the time they were first loaded about February 20 until they arrived at the consignee's warehouse [19] and were discharged.

Fifth—To the Fifth Cross-Interrogatory he says:

I don't know.

No. 6. How far is it from the place where the cars were loaded alongside the vessel to the place where the cars were unloaded at the consignee's warehouse.

Sixth—To the Sixth Cross-Interrogatory he says:

The most distant mill is the "Luz" mill which is about 1800 meters from the point of unloading .

No. 7. Explain the reason for or causes of the lapse of time between loading the cars alongside the vessel and arrival of the cars at consignee's warehouse some ten or twelve days later.

Seventh—To the Seventh Cross-Interrogatory he says:

I don't know.

No. 8. Who arranged for or hired the cars in question?

(Deposition of Izaias Luiz.)

Eighth—To the Eighth Cross-Interrogatory he says:

The cars were probably those belonging to the Port Administration and hired by the company. I don't know for certain.

No. 9. Was any inspection made of the bags of flour at the time they were being discharged from the cars at the consignee's warehouse, and if so, state who made the inspection and the result thereof as to the condition of the [20] bags of flour.

Ninth—To the Ninth Cross-Interrogatory he says:

I don't know. Probably the bags were inspected.

No. 10. Please describe the character of rainfall usually encountered in Rio de Janeiro during February and March, particularly as to whether it is a light, steady rain or a heavy rain for a short period of time, and at what hour or hours of the day or night it is most likely to rain.

Tenth—To the Tenth Cross-Interrogatory he says:

This no one can say.

No. 11. Did you keep any record of the rainfall during the period the cars in question were loaded with flour?

Eleventh—To the Eleventh Cross-Interrogatory he says:

I made no record.

No. 12. If you have answered that the cars were covered with tarpaulins or other covering after being loaded, explain fully why this was done.

Twelfth—To the Twelfth Cross-Interrogatory he says:

To avoid wetting in case of rain.

(Deposition of Izaías Luiz.)

No. 13. Explain in detail the size, construction and general characteristics of the cars, wagons or trucks which carried the flour.

Thirteenth—To the Thirteenth Cross-Interrogatory he says:

The usual open railroad car, box-shaped, weighing from 30 to 45 tons, holding 600 to 800 bags. [21]

No. 14. If you have answered that you did examine the bags of flour when discharged from the ship, please state the purpose of such examination by you, whether the Brazilian Customs or anyone else made an examination at the same time, and to whom you made a report as to the results of such examination.

Fourteenth—To the Fourteenth Cross-Interrogatory he says:

No one examined the flour at the time of unloading.

* * *

No. 17. Describe fully how the sacks of flour were discharged from the cars, such as——

(a) Where the cars were placed, whether inside or outside the warehouse.

(b) How the sacks were discharged and what was done with them immediately upon being discharged.

(c) How the sacks were piled in the warehouse.

(d) The type of floor in the warehouse and whether dunnage was used under the sacks, or otherwise.

(Deposition of Izaias Luiz.)

Seventeenth—To the Seventeenth Cross-Interrogatory he says:

I wasn't there.

* * *

No. 19. On what date and at what hour did the cars arrive at consignee's warehouse.

Nineteenth—To the Nineteenth Cross-Interrogatory he says:

I don't know. [22]

No. 20. How long did it take to unload the cars and on what date and at what hour was the unloading completed.

Twentieth—To the Twentieth Cross-Interrogatory he says:

I don't know."

Mr. Howard: That concludes the deposition of this witness, Your Honor. We offer that in evidence.

The Court: Each of these depositions and parts of such as have been read is now received in evidence as part of the libelants' case in chief.

Court will be in recess ten minutes.

(Recess.)

The Court: You may resume the taking of testimony and call libelants' next witness.

(Copy of letter 3-2-46 and letter 3-9-46 marked Libelant's Exhibit 3 for Identification.)

The Court: Is this proffered exhibit in connection with any testimony that is being taken, or is it pursuant to stipulation?

Mr. Howard: It will be pursuant to stipulation, Your Honor.

The Court: Does it have a name that each side may agree upon which you may state for our future reference?

Mr. Howard: For identification, I can identify Libelant's Exhibit 3 as a copy of a letter from the [23] libelant corporation to the agent for the respondent at Rio de Janeiro, and the date of the letter is March 2, 1946.

The Court: Do you offer it?

Mr. Howard: I offer that now pursuant to oral stipulation.

Mr. Wakefield: I have no objection to it, but I would like to suggest that the other letter he has, which is a reply to that letter, be attached and both made the same exhibit.

The Court: Can it be attached at the bottom?

Mr. Wakefield: Yes. The top one is the original letter and the bottom one the answer.

Mr. Howard: The other letter counsel has referred to is dated March 9, 1946, from Moore-McCormack, Inc., at Rio de Janeiro, to the libelant corporation in the same city. To each of the copies is attached a translation from Portuguese into English. I offer both of those, now identified as Libelant's Exhibit 3.

The Court: Libelant's Exhibit 3 is admitted.

(Libelant's Exhibit 3 received in evidence.)

Mr. Howard: The first of these letters I am reading, if the Court please, is the translation from Portuguese into English of the letter of March 2, 1949, from Companhia Luz Stearica, Sec. Moinho da Luz, Rio de Janeiro, Brazil, to Moore-McCormack, S. A., at a street address in Rio de Janeiro.

“Gentlemen: Ref.: 10,500 sacks with 252,000 kilos of flour shipped in New York on the steamship “Sweepstakes,” corresponding to bills of lading dated 1/31/36. Having noted a certain number of torn sacks with loss of contents, and as many more wet, on the unloading of the flour under reference, we are advising you that we hold the steamer’s owners responsible, as transporters, for the averages above mentioned.

“There being nothing further, we are, Yours respectfully, Companhia Luz Stearica Sec. Moinho da Luz” by a director.

The Court: On what issue does that bear?

Mr. Howard: It bears on the issue of any notice [27] given to the respondent or agents of respondent of damage discovered to this shipment upon arrival at Rio de Janeiro, and upon the remarks that counsel made in his opening statement on behalf of respondent as to there being no opportunity for the respondent or its representatives to inspect the shipment or to participate in any survey that was made or any tests that were made as to the damage found in the shipment.

The second letter is on Moore-McCormack’s letterhead, at Rio de Janeiro, dated March 9, 1946, to

Messrs. Moinho da Luz, Cia Luz Stearica, at Rio de Janeiro.

“Ref: SS Sweepstakes, V-12S 10,500 Sacks of flour. Gentlemen: In reply to your favor of the 2nd inst., we must inform you that according to the registers of defects and averages of the Wharf Warehouse, the packages above were unloaded in perfect condition, the which exempts us from any responsibility.

“There being nothing further, we are, Yours sincerely, Moore-McCormack (Navagacao) S/A., Representative of the Moore-McCormack Lines, Inc., agent of the “War Shipping Administration” of the U.S.A., By: A. M. Caswell, Dept. Defects and Averages.”

The Court: In that connection, will you state, if you think a statement could be agreeable to the opposing side, what the discharge date of this shipment was? [28]

Mr. Howard: Counsel has stated, and as I think will be borne out from the testimony, without checking it immediately, discharge commenced on February 21st.

The Court: Of 1946?

Mr. Howard: 1946. As to the completion date of discharge, I am not certain. I believe counsel mentioned the 25th or 26th of February.

Mr. Wakefield: The deposition will show it was completed at 10:10 a.m., February 25th.

The Court: Commenced on February 21st and completed at 10:10 a.m., February 25, 1946?

Mr. Wakefield: Yes, Your Honor.

Mr. Howard: Libelant next offers the deposition of Francisco Ramos. By stipulation, the testimony of Mr. Ramos was taken in place of the witness designated on the interrogatories as Mr. C. S. Botelho.

The Court: Then you are reading the questions addressed to Botelho?

Mr. Howard: Yes, Your Honor.

The Court: Those are answered by Mr. Ramos?

Mr. Howard: Yes, Your Honor. There is a stipulation attached to the original covering that substitution.

The Court: You may proceed. [29]

DEPOSITION OF FRANCISCO RAMOS

Direct Examination

“No. 1. Please state your name, age, nationality, and where you now live and reside.”

First—To the First Interrogatory he says:

“Francisco Ramos, age 27, Brazilian nationality, Rua Amiris, No. 50, apartment 104, Rio de Janeiro, Brazil.

No. 2. State by whom, where and in what capacity you were employed in February and March, 1946.”

Second—To the Second Interrogatory he says:

Companhia Imobiliaria Financeira Americana S. A. I was employed as a surveyor.

No. 3. State for how long you were employed in

(Deposition of Francisco Ramos)

the above capacity; also, whether you are still employed by the same concern.

Third—To the Third Interrogatory he says:

From December, 1939, to the present with the same company and in the same capacity.

No. 4. State the duties of such employment and what qualifications you have for such position by education, training or previous experience.

Fourth—To the Fourth Interrogatory he says:

When merchandise insured by our company arrives damaged, I survey it. My experience is practical. I have had no special training.

No. 5. If in answer to the last three preceding interrogatories you state that you were, in February and [30] March, 1946, employed by Companhia Imobiliaria Financeira Americana S. A. at Rio de Janeiro, Brazil, as a marine surveyor, state whether or not, as part of your duties, you then made an inspection, or inspections, for such concern of a certain shipment of wheat flour in sacks consigned to Cia. Luz Stearica which was discharged from the steamer "Sweepstakes" after the arrival of the vessel at Rio de Janeiro on or about February 20, 1946.

Fifth—To the Fifth Interrogatory he says:

Yes.

No. 6. If you have answered the last preceding interrogatory in the affirmative, state to whom said shipment of wheat flour was consigned, and, if you know, the quantity of flour in the shipment inspected.

(Deposition of Francisco Ramos)

Sixth—To the Sixth Interrogatory he says:

It was consigned to Companhia Luz Stearica. 3,087 sacks were damaged. About half a dozen sacks were opened to determine the damage. All sacks were in the same condition. An additional 197 bags were torn but not damaged by water. These bags were not considered because they were not covered by the insurance.

No. 7. If you have answered Interrogatory No. 5 in the affirmative, state (a) how many inspections were made by you; (b) when you made such inspection, or inspections; and (c) at what particular warehouse, dock, or other place [31] the shipment was located at the time you made such inspection or inspections.

Seventh—To the Seventh Interrogatory he says:

(a) Two.

(b) March 6 and March 8, 1946. (Here witness consulted notes.)

(c) At the mills of Cia. Luz Stearica."

The Court: Does the abbreviation Cia. correspond to our abbreviation Co.?

Mr. Howard: I believe it does, Your Honor.

Mr. Crutcher: That is my understanding, and the letters S. A. are used for a corporation.

The Court: The same as the British Ltd.?

Mr. Crutcher: That is my understanding, meaning Societe Anonyme.

"No. 8. State fully and in detail as to each inspection made by you, in what manner you made

(Deposition of Francisco Ramos)

such inspection, including whether the bags were examined individually or in tiers and about what percentage of the bags were thus examined.

Eighth—To the Eighth Interrogatory he says:

The damaged sacks could be seen by spots on the bag. These bags were separated from the others and piled in fifteen piles and counted. Six were then selected at random [32] and opened.

No. 9. State fully and in detail as to each such inspection what you found, upon examination, as to the external condition of said bags of flour, and particularly as to dryness or dampness.

Ninth—To the Ninth Interrogatory he says:

The sacks were dry but spotted. The flour had formed a hard crust.

No. 10. If in answer to the last preceding interrogatory you have stated that you found a condition of dampness on the external surfaces of the bags of flour, state the quantity or percentage of the shipment inspected that was found to contain dampened sacks.

Tenth—To the Tenth Interrogatory he says:

The sacks had already dried out.

No. 11. Were any samples obtained of the dampened portions of the flour shipment which had been inspected by you?

Eleventh—To the Eleventh Interrogatory he said:

Samples were taken from six bags.

12. State whether you personally, or individuals under your personal supervision, obtained the samples of flour from the shipment of flour discharged

(Deposition of Francisco Ramos)

from the steamer "Sweepstakes" on or about February 20, 1946, and to whom the samples of flour were delivered to by yourself or individuals under your personal supervision. [33]

Twelfth—To the Twelfth Interrogatory he says:

I personally took the samples and delivered them to Dr. A. Barreto, chemist, professor at the School of Agronomy.

No. 13. State whether a chemical analysis was obtained of the said samples, and if so, state by whom the chemical analysis was made, at whose request, and upon what date the report was requested and received.

Thirteenth—To the Thirteenth Interrogatory he says:

I requested an analysis from Dr. Barreto on March 7. The report of analysis was delivered on March 11.

No. 14. If your answer to Interrogatory No. 12 is in the affirmative, please refer to document attached hereto, marked Exhibit 1, purporting to be a photostatic copy of report written in the Portuguese language of A. Barreto, dated at Rio de Janeiro, March 2, 1946, and state whether it is a true copy of the report of chemical analysis which was requested on the damaged flour in this shipment.

Fourteenth—To the Fourteenth Interrogatory he says:

It is.

No. 15. State, if you know, whether a separate

(Deposition of Francisco Ramos)

analysis was made on the damaged flour and upon the surfaces of the packing material or bags in which the flour was contained.

Fifteenth—To the Fifteenth Interrogatory he says:

Yes, Dr. Barreto made separate analyses of the flour and [34] the material.

No. 16. Were any samples of the damaged or dampened flour preserved and available for examination at this time.

Sixteenth—To the Sixteenth Interrogatory he says:

No.

No. 17. State your opinion in detail from an inspection and examination of the damaged flour, and from consideration of the chemical analysis obtained on such flour, as to the nature of damage and the cause of such damage.

Seventeenth—To the Seventeenth Interrogatory he says:

From my inspection it appeared that the damage was caused by water. The chemical analysis showed it to be salt water.

No. 18. State the amount or percentage of damage or depreciation found by you from the inspection, examination and chemical analysis mentioned in the preceding interrogatory.

Eighteenth—To the Eighteenth Interrogatory he says:

It is my opinion that the damage was thirty-five per cent.

(Deposition of Francisco Ramos)

No. 19. State the method adopted by you in computing the amount or percentage of damage or depreciation mentioned in the preceding interrogatory. Nineteenth—To the Nineteenth Interrogatory he says:

The six sacks were opened. In each sack it was estimated that nine kilos of flour were damaged. The percentage was [35] therefore calculated at thirty-five per cent. It could be seen that the other unopened bags were in the same condition.

No. 20. Was a written report of your inspection and survey of this damaged flour prepared by you at the time of or shortly after your inspection of the shipment?

Twentieth—To the Twentieth Interrogatory he says:

Yes.

No. 21. If your answer to the preceding interrogatory is in the affirmative, please state whether you have in your custody a copy of said report of survey. Twenty-first—To the Twenty-first Interrogatory he says:

No.

* * *

No. 24. State whether you have examined the records of the Customs Warehouse at Rio de Janeiro to determine if a record was made of the discharge and disposition of this shipment of wheat flour consigned to Cia. Luz Stearica and discharged from the S.S. "Sweepstakes" at Rio de Janeiro on or about February 20, 1946.

(Deposition of Francisco Ramos)

Twenty-fourth—To the Twenty-fourth Interrogatory he says:

I examined the records. There is only a notation of the quantity of bags discharged directly to railroad cars of the port administration for shipment to the mill. There is no notation regarding condition of the shipment.

No. 25. If your answer to the preceding [36] interrogatory is in the affirmative, state whether or not such record is required to be retained in the files of said department or agency.

Twenty-fifth—To the Twenty-fifth Interrogatory he says:

A record of the quantity unloaded is in the files of the customshouse.

No. 26. If your answer to the preceding interrogatory is in the affirmative, please obtain, if possible, and deliver to the United States consular officer taking this deposition, a duly certified copy of such record with respect to the discharge and disposition of this flour shipment in the Customs Warehouse, said document to be authenticated by the U.S. consular officer and returned with this deposition, marked as Exhibit 3 for identification.

Twenty-sixth—To the Twenty-sixth Interrogatory he says:

I will try to obtain this record.

(Witness unable to obtain record.)

No. 27. Do you expect to be in the State of Wash-

(Deposition of Francisco Ramos)

ington, U.S.A., at any time during the next six months?

Twenty-seventh—To the Twenty-seventh Interrogatory he says:

No.”

The Court: Those connected with this case are excused until Monday afternoon, October 31, at 2 o'clock.

(At 5:10 o'clock p.m., Friday, October 28, 1949, proceedings recessed until 2:00 o'clock p.m., Monday, October 31, 1949.) [37]

October 31, 1949

The Court: You may proceed in the case on trial.

Mr. Howard: When we suspended last Friday, we had read the direct interrogatories of the witness Francisco Ramos and we were at the cross-interrogatories.

“Cross-Interrogatories

Interrogatory No. 1: At whose request and under what circumstances and for what purpose did you examine or survey the shipment of flour discharged from the Sweepstakes on or about February 20, 1946, consigned to Cia. Luz Stearica?

First—To the First Cross-Interrogatory he says:

The Cia. Luz Stearica requested the survey to determine the quantity of damaged flour.

Interrogatory No. 2: On what date were you first

(Deposition of Francisco Ramos)

contacted and requested to survey this flour, and state where the shipment was then located.

Second—To the Second Cross-Interrogatory he says:

On the 6th of March we received a letter requesting the survey. The letter was written March 2. The shipment was located at the company's mills.

Interrogatory No. 3: If you made more than one [38] survey, state the reasons for the additional surveys, when they were made and what was done by you on each occasion.

Third—To the Third Cross-Interrogatory he says:

On the first inspection, March 6, we were not able to agree as to the quantity of damage. On March 8 one more inspection was made. On the second occasion we called in Dr. Barreto who examined the sacks and gave his opinion as thirty-five per cent damage. The company protested and we finally agreed on forty per cent.

Interrogatory No. 4: If you personally took samples of flour for analysis, state the date when you took them, how they were taken, from how many bags, and whether they were taken only from wet bags.

Fourth—To the Fourth Cross-Interrogatory he says:

On March 6 I took six samples from six sacks, one from each sack. Samples were taken only from wet bags. I cut a piece of crusted flour with the sack material sticking to it.

(Deposition of Francisco Ramos)

Interrogatory No. 5: If you have stated that any of the bags were wet or damp when you examined them, state in detail the number of bags actually wet, the number of bags that were damp and the number of bags which showed evidence of being wet but had dried out at the time of inspection.

Fifth—To the Fifth Cross-Interrogatory he says:

All of the 3,087 sacks showed evidence of having been [39] wet, but they had already dried out at the time of inspection.

Interrogatory No. 6: Describe in detail the character of the wetness, dampness or stains on the bags, such as whether they were wet on the ends or sides of the bags, whether the whole surface was wet, or whether there were only spots or patches wet, and in the latter case state where the spots or patches were located on the bags or if the bags varied as to places and as to extent of wetness, please so state and describe as best you can.

Sixth—To the Sixth Cross-Interrogatory he says:

The damage was in patches of various sizes, some located on the ends, some on the sides. No system could be noted.

Interrogatory No. 7: Did you open the bags to determine how far into the bags the wet or dampness had penetrated into the flour, and if so, please describe the extent of penetration into the bags.

Seventh—To the Seventh Cross-Interrogatory he says:

I opened six bags. The dampness had penetrated to an average depth of five centimeters.

(Deposition of Francisco Ramos)

Interrogatory No. 8: If in answer to Interrogatory No. 17, you have stated that the flour was damaged by salt water, please explain how in your opinion the presence of chlorides would indicate salt water, and also:

(a) What percentage of chlorides is normally found in sound flour; [40]

(b) What percentage of chlorides is indicated to you in making your foregoing answer by the word "presenca."

(c) Do you base your opinion of the salt water damage on any other fact or condition than the chemical analysis above referred to, and if you do, please explain in detail what other factors or conditions were considered and how these indicate salt water damage.

Eighth—To the Eighth Cross-Interrogatory he says:

I am not a chemist and am unable to answer (a) and (b). My opinion as to the cause of damage is based on the opinion of Dr. Barreto.

Interrogatory No. 9: Was any chemical analysis made of the flour which you deemed to be sound and unaffected by any water, and if so, set forth the results of such analysis, or if not made, state why such analysis was not made.

Ninth—To the Ninth Cross-Interrogatory he says:

I do not believe that sound flour was analyzed, but if Dr. Barreto had the slightest doubt about the cause of damage he would probably have made a comparison. I cannot state for certain that a comparison was not made.

(Deposition of Francisco Ramos)

Interrogatory No. 10: Was any quantitative examination made of both damaged and sound flour from the same shipment;

(a) If it was made, set forth a comparison of the [41] results obtained;

(b) If not made, state how you know that the sound flour did not have the same percentage or "presenca" of chlorides as the alleged damaged flour.

Tenth—To the Tenth Cross-Interrogatory he says:

I do not think such an examination was made, therefore I cannot answer (a) and (b).

Interrogatory No. 11: In connection with Interrogatories Nos. 18 and 19, if you have answered that you determined a percentage of damaged flour out of the entire shipment, please also state the following:

(a) How many bags were actually opened and contents segregated?

(b) How was it possible to determine the extent of penetration of water into the bags?

(c) What method of segregation was used of sound and damaged flour?

(d) If there was no segregation, how did you determine the extent of damage as to each bag?

(e) Explain in detail how in your opinion the extent of chlorides indicated in the analysis as "presenca" would have any damaging effect on the flour and of what, in your opinion, the damage consisted.

(Deposition of Francisco Ramos)

Eleventh—To the Eleventh Cross-Interrogatory he says:

(a) Six sacks. [42]

(b) Each of the six sacks was cut open and the depth of penetration of damage measured.

(c) The sound and damaged flour was not segregated in computing the percentage of damage.

(d) The damage was estimated, taking into consideration the apparent depth of penetration and also the additional labor which would be required to salvage the good flour, and replacement of the bags.

(e) The question could be better answered by our chemist.

Interrogatory No. 12: In connection with your survey report please state:

(a) When you prepared it.

(b) Who asked you for the report and to whom you delivered it and when.

(c) What facts the report is based on and whether you made all of the observations contained in the report, or whether you obtained the information from someone else, and if so, from whom?

Twelfth—To the Twelfth Cross-Interrogatory he says:

(a) About the middle of March, after receipt of Dr. Barreto's analysis.

(b) The report was made automatically and was sent by mail to Cia. Luz Stearica.

(c) The report was based on my inspection and

(Deposition of Francisco Ramos)

on the chemical analysis. The opinion of Dr. Barreto also enters [43] into this report.

Interrogatory No. 13: What other signatures appear on the survey report and who is the person or persons signing the same. Did such person or persons also examine the flour?

Thirteenth—To the Thirteenth Cross-Interrogatory he says:

My signature and that of Christiano Santos Botelho appeared. Botelho did not examine the flour.

Interrogatory No. 14: Is it required or customary for Brazilian Customs to inspect such shipments of flour as the one in question and to make written report thereof?

Fourteenth—To the Fourteenth Cross-Interrogatory he says:

Brazilian customs only verify the quantity of sacks when, as in this case, the shipment is unloaded directly to rail cars.

* * *

Interrogatory No. 16: Does the Brazilian Customs report show any damage to the shipment of flour in question from water or salt water at the time of discharge to the Customs, or for any other reason.

Sixteenth—To the Sixteenth Cross-Interrogatory he says:

No.

Interrogatory No. 17: If discharge of the flour in question was not made to the Brazilian Customs,

(Deposition of Francisco Ramos)

state to whom the flour was delivered upon leaving the ship.

Seventeenth—To the Seventeenth Cross-Interrogatory he says: [44]

The flour was loaded on rail cars of the port administration and shipped direct to the consignee.

Interrogatory No. 18: Was the alleged damaged flour sold by you or under your direction, and if so, to whom and for what price?

Eighteenth—To the Eighteenth Cross-Interrogatory he says:

The damaged flour was not sold by us or under our direction.

Interrogatory No. 19: If the damaged flour was not sold, how did you or anyone else with your approval determine the extent and value of the damage, and please explain in detail.

Nineteenth—To the Nineteenth Cross-Interrogatory he says:

I don't know if the flour was sold. The damage value was calculated on a basis of percentage of damage, additional labor required, cost of new cotton bags.

Interrogatory No. 20: Is your determination of the extent and value of damaged flour based upon an estimate or guess, or was the flour actually segregated and reconditioned and the actual percentage of damaged flour determined?

Twentieth—To the Twentieth Cross-Interrogatory he says:

(Deposition of Francisco Ramos)

The value and extent of damage was based on an estimate.

Interrogatory No. 21: State with whom you have discussed the testimony you are now giving in this case, and when you did so. [45]

Twenty-first—To the Twenty-first Cross-Interrogatory he says:

I discussed it with Mr. Christiano Botelho after receiving the request to testify.”

Mr. Howard: That concludes the deposition of the witness Ramos, Your Honor. Libelant offers that in evidence at this time.

The Court: That is received in evidence as a part of libelant's case in chief.

Mr. Howard: Libelant next calls as its witness by deposition A. Barreto.

DEPOSITION OF ANTONIO BARRETO

Direct Examination

“No. 1. Please state your name, age, nationality and where you now live and reside.

First—To the First Interrogatory he says:

Antonio Barreto, aged 53 years, Brazilian nationality, Rua Torres Homen, No. 638, Rio de Janeiro, Brazil.

No. 2. State your occupation or profession and where you were employed in February, 1946, and whether you are presently acting or engaged in the same capacity.

(Deposition of Antonio Barreto.)

Second—To the Second Interrogatory he says:

I was a professor of chemistry in the National School of Agriculture (Escola Nacional de Agronomia) in Rio de Janeiro and technical consultant in Brazil of the Monsanto Chemical Company in February, 1946. I am presently engaged [46] in the same capacities, as well as a professor in the Military Technical School (Escola Tecnica do Exercito).

No. 3. State what qualifications you have for such a position, indicating education, college or university degrees held by you, and training or previous experience in the capacity of a chemist or laboratory analyst.

Third—To the Third Interrogatory he says:

I graduated from the University of Brazil and have done post graduate work in agriculture and chemistry, receiving an agricultural engineer's degree and a degree in chemistry. I have been a chemist for about thirty years.

No. 4. State whether or not in February or March, 1946, certain samples of wheat flour identified as consigned to Cia. Luz Stearica at Rio de Janeiro and discharged from the S.S. "Sweepstakes" were submitted to you for examination or chemical analysis by Companhia Imobiliaria Financeira Americana S.A.

Fourth—To the Fourth Interrogatory he says:

Yes.

No. 5. If your answer to the preceding interrogatory is in the affirmative, please state whether

(Deposition of Antonio Barreto.)

you did conduct a chemical analysis of the flour samples and submit a written report of your findings on the same to Companhia Imobiliaria Financeira Americana S.A.

Fifth—To the Fifth Interrogatory he says: [47]

Yes.

No. 6. If your answer to the preceding interrogatory is in the affirmative, please refer to the document attached hereto, marked "Exhibit 4," purporting to be a report made by you to Companhia Imobiliaria Financeira Americana S.A., dated March 2, 1946, at Rio de Janeiro, and state whether the signature appearing thereon is your signature subscribed thereon by way of execution of said document.

Sixth—To the Sixth Interrogatory he says:

Yes."

* * *

"No. 7. Is the document marked "Exhibit 4" a full, true and correct report of the chemical analysis made by you on the samples of flour submitted to you by Companhia Imobiliara Financeira Americana S.A.?"

Seventh—To the Seventh Interrogatory he says:

Yes."

Mr. Howard: Libelant offers Exhibit 4.

The Court: It is now in two parts. One appears to be something that looks like an original. It has attached to it what I believe to be a typewritten copy.

(Deposition of Antonio Barreto.)

Mr. Howard: Your Honor, I can explain that. The original is in Portuguese and counsel has agreed with me that translations made locally from Portuguese into English may be used subject to whatever objections he may have as to admissibility.

The Court: Is there any objection?

Mr. Wakefield: No objection.

The Court: Libelant's Exhibit 4 is now admitted.

(Libelant's Exhibit 4 received in evidence.) [50]

"No. 8. State fully and in detail what procedure was employed by you in determining the amount of chlorides present in the samples as reported in Exhibit 4."

Eighth—To the Eighth Interrogatory he says:

I made the analysis with silver nitrate and by the Volhard process.

No. 9. State, if you know, what amount of chlorides would normally be found to be present in good marketable wheat flour.

Ninth—To the Ninth Interrogatory he says:

Only a vestige of chlorides would normally be present.

No. 10. Did the results of the tests and analysis referred to in Interrogatory No. 8 indicate presence in the samples of chlorides in excess of the amount of chlorides normally present in good marketable wheat flour?

(Deposition of Antonio Barreto.)

Tenth—To the Tenth Interrogatory He Says:

Yes.

No. 11. If your answer to the preceding interrogatory is in the affirmative, please state what this result indicated as to the contamination of samples by salt water.

Eleventh—To the Eleventh Interrogatory He Says:

The flour had too much chloride because of contamination with salt water.

No. 12. How was the sodium content of the samples [51] of wheat flour determined?

Twelfth—To the Twelfth Interrogatory He Says:

By flame test, and my own process for sodium contamination which is published by Welcher in Organic Analytical Reagents, Volume I, page 180, and by Mellan in Organic Reagent in Inorganic Chemistry Analysis, page 552.

(Here witness consulted notes.)

No. 13. If in answer to the preceding interrogatory you state that the sodium content was determined by flame test, please describe fully and in detail the intensity and color of the flame created by burning extracts from the samples of wheat flour.

Thirteenth—To the Thirteenth Interrogatory He Says:

Qualitative tests were made by the flame test. The flame was pure yellow, intensive and high. For quantitative tests I used my own test, as mentioned above.

No. 14. Was the result of the tests reported in

(Deposition of Antonio Barreto.)

your answers to the two preceding interrogatories and in "Exhibit 4" indicative of an apparent excess of sodium content over the amount of sodium oxide usually found in good marketable wheat flour? Fourteenth—To the Fourteenth Interrogatory He

Says:

Yes.

No. 15. Was a comparative analysis made of the samples of flour submitted to you by Companhia Imobiliaria [52] Financeira Americana S. A. and other flour intentionally contaminated by salt water? Fifteenth—To the Fifteenth Interrogatory He

Says:

Yes, I always make this comparative test for all kinds of analyses.

No. 16. If your answer to the preceding interrogatory is in the affirmative, please state fully and in detail the comparative results of the testing and analysis of the samples of flour submitted by Companhia Imobiliaria Financeira Americana S. A. and other flour intentionally contaminated by sea water.

Sixteenth—To the Sixteenth Interrogatory He Says:

The analysis in each case was the same. The flour submitted by Companhia Imobiliaria Financeira Americana S. A. contained more sodium than the other flour.

No. 17. Were separate analyses made on the flour samples and upon the bags or packing material in which the flour was contained?

(Deposition of Antonio Barreto.)

Seventeenth—To the Seventeenth Interrogatory

He Says:

Yes.

No. 18. If your answer to the preceding interrogatory is in the affirmative, please state in detail what your finding was as to the presence or absence of salt crystals in scrapings from the external surfaces of the bags or containers. [53]

Eighteenth—To The Eighteenth Interrogatory he says:

It is absolutely impossible to see the crystals on the bags.

* * *

No. 20. If in answer to Interrogatory No. 18 you state that the scrapings from the external surfaces of the containers in which the wheat flour was submitted to you for analysis was liquid in form, please describe fully and in detail any test that was performed by you upon said scrapings and your findings with respect to the presence or absence of chlorides in said scrapings.

Twentieth—To The Twentieth Interrogatory, he says:

I did not take scrapings. I cut a piece of the bag, together with the wheat flour which was caked to the bag. I separated the bag from the flour and made an analysis of the bag. I found chloride in the bags.

No. 21. State the quantity by number of sacks or containers and pounds or other weight measure,

(Deposition of Antonio Barreto.)

if known, of the samples of flour submitted to you for analysis by Companhia Imobiliaria Financiera Americana S. A.

Twenty-First—To The Twenty-First Interrogatory he says:

I took six samples from six different bags, each sample weighing about two hundred grams.

No. 22. Were any of the samples of wheat flour submitted for analysis preserved by you and now available [54] for examination?

Twenty-Second—To The Twenty-Second Interrogatory he says:

No.

No. 23. Upon the basis of the tests, analysis and examination by you of samples of flour submitted in February or March, 1946, by Companhia Imobiliaria Financeira Americana S. A. as referred to in Exhibit 4, please state fully and in detail your opinion as to the nature and cause of any damage to the flour found by you.

Twenty-Third—To The Twenty-Third Interrogatory he says:

There is no doubt in my mind that the damage to the flour was caused by mould, bacteria and fungus, resulting from moisture, a direct consequence of contamination by salt water.

No. 24. How did you arrive at the percentage of 35% of value of the flour which was reported by you in Exhibit 4?

Twenty-Fourth—To The Twenty-Fourth Interrogatory he says:

(Deposition of Antonio Barreto.)

After examining the damaged bags I determined the percentage of damage on each bag; thirty-five per cent is the average of damage on each bag.

No. 25. Do you expect to be in the State of Washington, U. S. A., at any time within the next six months?

Twenty-Fifth—To the Twenty-Fifth Interrogatory he says:

No.” [55]

Mr. Howard: I would like at this time to read the English translation of Dr. Barreto’s report, now admitted as Libellant’s Exhibit 4.

The Court: You may do that.

Mr. Howard: “Photostatic copy of report of March 11, 1946, from A. Barreto, Rio de Janeiro, To: Messrs: Companhia Imobiliaria Financeira Americana S/A City.

“The analysis made on two samples of wheat flour, with the designations: Moinho da Luz—Recl. 18025, gave the following result;

Chlorites

(derivatives of chloric acid).....Presence

SulfatesTraces

SodiumPresence

Calcium and Magnesium.....Traces

Reaction Acid

“From the result of the above analysis, it is concluded that the average came from salt water.

“From the result of the analysis and by the in-

(Deposition of Antonio Barreto.)

spection proceeded, it was verified that the average extends to 35% of the value of the same flour.”

The Court: At this point we will take a recess of about ten mintues.

(Recess.) [56]

The Court: You may resume the reading of the deposition.

Cross-Interrogatories

“Interrogatory No. 1: Who delivered the samples of alleged damaged flour to you and when did you receive them?

First—To The First Cross-Interrogatory he says:

Cia. Luz Stearica on March 8, 1946. [Here witness consulted Exhibit No. 4.]

Interrogatory No. 2: In connection with the samples you received, please state the following:

- (a) How many samples did you receive?
- (b) How were they marked or identified?
- (c) In what form were the samples submitted and what quantity was there in each sample?
- (d) How many separate samples did you analyze?

(e) If you analyzed less than all of the samples, please state your method of selection of samples to be analyzed and why all of them were not analyzed.
Second—To The Second Cross-Interrogatory he says:

- (a) Six.
- (b) By name of the company, Cia. Luz Stearica, number of the claim and of the ship.

(Deposition of Antonio Barreto.)

(c) The samples were pieces of the bags with caked wheat flour sticking to them; two hundred grams in [57] each sample.

(d) Six.

(e) All six samples were analyzed."

Mr. Wakefield: May I digress for a moment and call the Court's attention to the fact that the reason for that last question is that the exhibit states that two samples were analyzed.

The Court: Some witness whose answers were read today has said that there were six samples taken, he did not know how many were analyzed.

Mr. Crutcher: The surveyor so testified, Your Honor.

Mr. Wakefield: Six were taken, and Dr. Barreto in his report says he examined two. In this cross-examination he says he examined six.

"Interrogatory No. 3: Where were these samples taken and what, if anything, did you have to do with obtaining or identifying the samples?

Third—To The Third Cross-Interrogatory he says:

They were taken at the storehouse and I was there watching while the samples were cut out and I witnessed the marking of the samples.

Interrogatory No. 4: Explain in detail the procedure you followed in making your analysis of the sample [58] or samples.

Fourth—To The Fourth Cross-Interrogatory he says:

All six samples were analyzed by the flame test,

(Deposition of Antonio Barreto.)

with silver nitrate, by the Volhard process, and by my own process for sodium contamination which is published by Welcher in Organic Analytical Reagents, Volume I, page 180, and by Mellan in Organic Reagent in Inorganic Chemistry Analysis, page 552.

Interrogatory No. 5: Did you make a quantitative examination of both the damaged and undamaged flour?

Fifth—To the Fifth Cross-Interrogatory he says: Yes.

Interrogatory No. 6: If you did make a quantitative examination, please give the comparison of the results obtained between the damaged and undamaged flour.

Sixth—To The Sixth Cross-Interrogatory he says:

I found that there was more sodium chloride in the damaged than in the undamaged flour.

* * *

Interrogatory No. 8: Your report states:

“Chlorides—presence” and Sodium—presence.” What percentage does this mean or can you state the percentage or amount of chlorides and sodium present in the alleged damaged flour?

Eight—To The Eight Cross-Interrogatory he says:

By “presence” is meant that there is too much chloride and sodium. I can’t remember the percentages.

Interrogatory No. 9: Is it your opinion that the presence of chlorides or of sodium or of both in the

(Deposition of Antonio Barreto.)

flour you examined must necessarily have come from salt water?

Ninth—To The Ninth Cross-Interrogatory he says:

Yes, because the flour was caked from having been wet.

Interrogatory No. 10: What is the basis of your opinion "that the damage ascertained must be attributed to salt water" and please explain this in detail.

Tenth—To The Tenth Cross-Interrogatory he says:

I have long experience in this line and have made hundreds of analyses of wheat flour. I have analyzed fresh water contamination and only a vestige of sodium chloride was present.

Interrogatory No. 11: Have you ever made any tests on undamaged flour by analysis of the ash to determine the mineral content of such flour, and if so, state what you have found with respect to the presence of chlorides and of sodium.

Eleventh—To The Eleventh Cross-Interrogatory he says:

Yes, there was only a vestige of chloride and of sodium; good wheat flour has more potassium chloride and calcium chloride, but none, or only a vestige, of sodium chloride.

Interrogatory No. 12: Do you deny that a qualitative ash analysis of flour not in contact with salt water will show the presence of chlorides and sodium, and if so, please explain. [60]

Twelfth—To The Twelfth Cross-Interrogatory he says:

(Deposition of Antonio Barreto.)

It will show some vestige of chlorides.

Interrogatory No. 13: Explain what the presence of sodium indicates with respect to any salt water contamination.

Thirteenth—To The Thirteenth Cross-Interrogatory he says:

If sodium is present in wheat flour it is evident that it is combined with chloride. Sodium alone does not necessarily indicate salt water contamination. Sodium and chloride in equal quantities in flour which is wet or caked indicates that this flour has been in contact with salt water.

Interrogatory No. 14: What percentage or amount of sodium did you find in the flour in question?

Fourteenth—To The Fourteenth Cross-Interrogatory he says:

I do not remember exactly—only that it was too much.

Interrogatory No. 15: What amount or percentage of sodium do you find in flour not contaminated with salt water?

Fifteenth—To The Fifteenth Cross-Interrogatory he says:

Only a vestige.

Interrogatory No. 16: If you admit or deny the presence of chlorides and/or sodium in sound flour not in contact with salt water, state whether this applies to all [61] wheat flour or whether the particular wheat used or processed in making the flour

(Deposition of Antonio Barreto.)

may cause the mineral content of the flour to vary, and please explain in detail.

Sixteenth—To The Sixteenth Cross-Interrogatory he says:

Yes, the particular wheat used or processed can cause a variation in the mineral content of the flour, but in the case of sodium and chlorides the variation is very small because too much sodium is poison to the plant.

Interrogatory No. 17: What is the basis of and the factors considered by you in coming to the conclusion that the damage to the flour was 35%?

Seventeenth—To The Seventeenth Cross-Interrogatory he says:

The average quantity of the damage and the nature of the damage—mould, bacteria, fungus growths and a bad odor to the flour.

Interrogatory No. 18: Is this alleged 35% damage the estimated damage sustained only to the damaged flour, or does it represent 35% of the value of the entire shipment, and please explain how you arrived at this figure.

Eighteenth—To The Eighteenth Cross-Interrogatory he says:

Thirty-five per cent was of the bags I saw in the storehouse. I saw only damaged bags; thirty-five per cent of the flour in the damaged bags was spoiled. I looked at about twenty of the bags taken from the damaged lot and concluded that the per-

(Deposition of Antonio Barreto.)

centage of damage was thirty-five per cent. [62]

Interrogatory No. 19: Please explain why, in your opinion, flour with a trace or the percentage of chlorides and/or sodium you found in the samples reduces its value in any respect, or reduces its value to the extent of 35%.

Nineteenth—To The Nineteenth Cross-Interrogatory he says:

The damage to the bags was because of wetting, not chlorides; moisture causes mould, bacteria, fungus, etc. There were sea algae on the bags.”

Mr. Wakefield: If the Court please, I would like to move to strike the last sentence, “There were sea algae on the bags.” as not responsive; also, the fact that his report, Exhibit 4, makes no mention of any such thing. It is purely a gratuitous, voluntary statement, not in accordance with the rest of his evidence.

The Court: Read the question.

Mr. Wakefield: “Please explain why, in your opinion, flour with a trace or the percentage of chlorides and/or sodium you found in the samples reduces its value in any respect, or reduces its value to the extent of 35%.”

We are talking about chlorides and sodium, and at the end of his answer he adds the gratuitous statement about sea algae, which is something not covered any [63] place in this testimony. I move it be stricken.

Mr. Howard: I submit, Your Honor, that is part

(Deposition of Antonio Barreto.)

of the witness' answer. Counsel in this cross-interrogatory submitted to him asked him to please explain why, and the fullest extent should be given to the witness in the scope of his answer as to explanation of the question that was asked. I think the part counsel objects to is a very material part of the answer and has a very definite bearing on this case.

The Court: He does not say that moisture causes sea algae. If he had put that in after fungus, I would not feel that it should be stricken, but I am not so sure that it is a fact, even in the absence of testimony, that sea algae is produced by moisture alone. I am not so sure it does not take something besides moisture to put sea algae on a wet sack, but whatever that may be, I think it is a voluntary statement.

The request for striking is granted.

"Interrogatory No. 20: State with whom you have discussed the testimony you are now giving in this deposition and when you discussed it on each occasion that you discussed it.

Twentieth—To The Twentieth Cross-Interrogatory he says:

I discussed it with Mr. Botelho and Mr. Ramos in 1946. [64] Since then I have not discussed it with anyone else."

Mr. Howard: That concludes the deposition of Dr. Barreto, and libelant offers that deposition in evidence.

The Court: It is received in evidence as a part of libelant's case in chief.

Mr. Howard: Next, if the Court please, libellant will call the witness by deposition Mr. Jorge Quadros Ferreira.

DEPOSITION OF JORGE FERREIRA

Direct Examination

“Interrogatory No. 1: Please state your name, age, nationality and where you now reside?

First—To The First Interrogatory he says:

Jorge Quadros Ferreira; 26; Brazilian; Rua Alecrim No. 824, Rio de Janeiro, Brazil.

Interrogatory No. 2: State by whom, where and in what capacity you were employed in February and March, 1946.

Second—To The Second Interrogatory he says:

I was employed by Moinho da Luz, Rua Benedito Ottoni, No. 24, Rio de Janeiro, as office clerk.

Interrogatory No. 3: State for how long you have been employed in the above capacity; also whether you are still employed by the same concern and in the same capacity.

Third—To The Third Interrogatory he says: [65]

I was employed from 1944 to 1947 in this capacity and am still employed by the aforementioned company with title of chief clerk.

Interrogatory No. 4: State the duties of your employment and what experience and training you have in connection with the position which you held in February and March, 1946.

Fourth—To The Fourth Interrogatory he says:

(Deposition of Jorge Ferreira.)

My duties were those of an office clerk, including payment of shipping expenses and recording receipt of cargoes. I had nine years' experience and training with the company prior to February-March 1946.

Interrogatory No. 5: Are you familiar with a certain shipment of 10,500 bags of wheat flour consigned to Companhia Luz Stearica and shipped on board the S.S. "Sweepstakes" from New York, arriving at Rio de Janeiro about February 20, 1946; and state generally what your duties or activities were with respect to such shipment.

Fifth—To The Fifth Interrogatory he says:

I am familiar with the shipment; inspect and check on arrival of bags at the warehouse.

Interrogatory No. 6: Please state the date or dates upon which this shipment of flour arrived at the consignee's mill or warehouse from the vessel.

Sixth—To The Sixth Interrogatory he says:

February 22, 1946, delivery [66] began. Delivery continued over a period of some days.

Interrogatory No. 7: Describe the warehouse or structure in which the shipment of flour was stored by consignee in February and March, 1946, including in detail the type and condition of flooring, walls and roof, and the presence or absence of dampness within the structure by reason of leakage or otherwise at that time.

Seventh—To The Seventh Interrogatory he says:

The warehouse is of concrete; the floor and roof are of concrete and walls of building tile. The building has three floors, with ground floor one meter

(Deposition of Jorge Ferreira.)

above the ground, and concrete floor covered by asphalt. No leakage or other dampness was present at the time.

Interrogatory No. 8: For what purpose was the warehouse or structure designed, in which this shipment of flour was stored by consignee?

Eighth—To The Eighth Interrogatory he says:

The building was designed for the storage of flour.

Interrogatory No. 9: Have you ever experienced difficulty with flour becoming damp or damaged by wetness while stored in the above described warehouse?

Ninth—To The Ninth Interrogatory he says:

No previous difficulty has been experienced with flour becoming damp or being dampened. [67]

Interrogatory No. 10: Did you inspect the bags of flour in this shipment upon arrival at consignee's warehouse to determine the extent of damage sustained to the flour by wetness?

Tenth—To The Tenth Interrogatory he says:

I inspected the flour at time of arrival, setting aside the flour which was wet.

Interrogatory No. 11: Did you supervise an inspection of this shipment of flour at consignee's warehouse to determine the extent of damage sustained by wetness?

Eleventh—To The Eleventh Interrogatory he says:

There was an inspector at each of the entries where flour was being brought into the warehouse from railroad cars. I supervised the inspectors in their activities.

(Deposition of Jorge Ferreira.)

Interrogatory No. 12: If your answer to either Interrogatory No. 10 or No. 11 is in the affirmative, please state your finding as to the extent of damage to the shipment of flour by wetness, expressing the same in terms of number of bags damaged, weight of the flour damaged to the extent that it was unmarketable, and/or the percentage of the flour in the damaged bags that was found to be damaged by wetness in the inspection made by you or under your supervision.

Twelfth—To The Twelfth Interrogatory he says:

I do not recall the exact number of bags damaged and [68] consequently cannot estimate the weight of flour damaged to such extent as to render it unmarketable.

Interrogatory No. 13: Were you present at consignee's warehouse in Rio de Janeiro when Dr. Antonio Barreto inspected and sampled the bags of flour in this shipment to determine the extent of damage sustained by wetness?

Thirteenth—To The Thirteenth Interrogatory he says:

I was not present.

Interrogatory No. 14: Dr. Barreto has stated that he found the wetness or dampness in each bag of damaged flour to be 35% of the total quantity. Please state whether you concur in that finding, and whether you concurred in Dr. Barreto's finding at the time he made his determination. If you did not concur at that time, or do not now concur with such

(Deposition of Jorge Ferreira.)

determination by Dr. Barreto, please explain in detail the reason therefor.

Fourteenth—To The Fourteenth Interrogatory he says:

The sacks were not opened by me and I am unable to give an opinion on the accuracy of Dr. Barreto's findings.

Interrogatory No. 15: State the total number of sacks of flour which were found to be damaged by wetness upon arrival of the shipment at consignee's warehouse.

Fifteenth—To The Fifteenth Interrogatory he says:

I do not know the number of sacks of flour, but I estimate the number to be over three [69] thousand.

Interrogatory No. 16: Was it possible to sell the sacks of flour mentioned in Interrogatory No. 15 in their condition as delivered to consignee's warehouse, without reconditioning the same?

Sixteenth—To The Sixteenth Interrogatory he says:

It was impossible to sell the flour mentioned in Question 15 above, and we did not attempt to do so.

Interrogatory No. 17: State what was done by consignee with respect to disposition of the flour in this shipment after damage by wetness to a portion thereof was discovered.

Seventeenth—To The Seventeenth Interrogatory he says:

The flour in good condition was sold and the damaged flour was sent to the mill to be reconditioned.

Interrogatory No. 18: Was it possible to sell that

(Deposition of Jorge Ferreira.)

portion of the flour in the bags which was damaged by wetness, and if so, to whom and for what price? Eighteenth—To The Eighteenth Interrogatory he says:

The damaged sacks were sent to the mill for separation of the wetted and unwetted flour. The former was thrown away, since Brazilian public health laws forbid its sale. I am not informed of the price or purchaser of the unwetted portion of the flour.

Interrogatory No. 19: Describe in detail the proceeding or method in reconditioning the marketable flour [70] after separation from damaged flour.

Nineteenth—To The Nineteenth Interrogatory he says:

I am not acquainted with the reconditioning process.

Interrogatory No. 20: If you have a record of the exact quantities of flour recovered from the damaged bags and reconditioned, please state the amounts recovered. If no such figures are available, explain why it is not possible for you to furnish such data.

Twentieth—To The Twentieth Interrogatory he says:

I do not have such a record, since the incident occurred three years ago. It would be necessary to consult the company's accounts where I believe such a record would be available.

Interrogatory No. 21: Please state what the actual value was between February 22 and March 1,

(Deposition of Jorge Ferreira.)

1946, at Rio de Janeiro of a fifty-kilo bag of Aida brand wheat flour, based upon the price for which the consignee could sell such flour on the open market at that time and place.

Twenty-First—To The Twenty-First Interrogatory he says:

I am unable to state the actual value for this type of flour at the time stated, based on selling price on the open market.

Interrogatory No. 22: What was the delivered cost per fifty-kilo bag of the flour in this shipment to the consignee, based upon the invoice cost and charges for ocean [71] freight and insurance? Please indicate any other incidental charges that are considered by the consignee in arriving at the delivered cost per bag of flour in this shipment.

Twenty-second—To the Twenty-second Interrogatory he says:

I am unable to state the delivered cost, such figures being available from the accounting department.

Cross-Interrogatories

Cross-Interrogatory No. 1: When and in what manner and by whom was the matter of your giving this deposition first brought to your attention?

First—To the First Cross-Interrogatory he says:

I was informed of the necessity of giving this deposition about one month ago, by the manager of the company.

Cross-Interrogatory No. 2: With whom and

(Deposition of Jorge Ferreira.)

when did you first discuss the matters you have testified to in this deposition? Please explain in detail.

Second—To the Second Cross-Interrogatory he says:

I did not discuss the matter with anyone but was merely informed by the manager of the company. He gave me a list of questions which I believe to be the same as the present ones.

Cross-Interrogatory No. 3: Have you been testifying from memory or did you make some record of these matters at [72] the time they occurred?

Third—To the Third Cross-Interrogatory he says:

I have mostly testified from memory but I have consulted records made at the time the shipment was received.

Cross-Interrogatory No. 4: If you have refreshed your memory from records, please state what these records are and when made and where they have been kept since you made them.

Fourth—To the Fourth Cross-Interrogatory he says:

I consulted personal records made at the time the shipment was received. The records were kept in my desk at the place where I am employed.

Cross-Interrogatory No. 5: How many shipments of flour similar to the shipment in question which arrived on the S.S. Sweepstakes about February 20, 1946, does Companhia Luz Stearica receive in a year's time?

Fifth—To the Fifth Cross-Interrogatory he says:

(Deposition of Jorge Ferreira.)

During 1946 and 1947 the company received a total of 200,000 bags, but since then only small quantities have been received. I do not know how many shipments were involved.

Cross-Interrogatory No. 6: Do you inspect all flour received by Companhia Luz Stearica and if so, state how many lots of flour you have inspected since March, 1946, to date.

Sixth—To the Sixth Cross-Interrogatory he says:

I used to make all inspections, but ceased to do so at [73] the end of 1947. I do not know how many inspections I made during this period.

Cross-Interrogatory No. 7: For what purpose do you inspect the flour, and do you do this personally or is it done under your supervision?

Seventh—To the Seventh Cross-Interrogatory he says:

I supervised the inspection of the flour to determine its condition, the number of bags delivered, and the number damaged. The supervision was done under my direction.

Cross-Interrogatory No. 8: Explain in detail how you make your inspection.

Eighth—To the Eighth Cross-Interrogatory he says:

The employees separated the wet or damaged bags to be counted separately. I verified the division.

Cross-Interrogatory No. 9: What record do you make of such inspections?

Ninth—To the Ninth Cross-Interrogatory he says:

I made a record of the number of bags wet or damaged.

(Deposition of Jorge Ferreira.)

Cross-Interrogatory No. 10: What is done with the record?

Tenth—To the Tenth Cross-Interrogatory he says:

This record was sent to the manager of the company for whatever action he desired to take.

Cross-Interrogatory No. 11: If you inspected the shipment of flour which arrived in Rio de Janeiro on the [74] S.S. Sweepstakes about February 20, 1946, state exactly and in detail what was done as follows:

(a) The day and the hours when the inspection was made;

(b) Where the flour was located at that time;

(c) How it was piled;

(d) Had there been any prior segregation of the wet sacks;

(e) Who was present at the time;

(f) Who assisted with the inspection;

(g) How did you make your inspection, as follows:

(1) The number of bags you actually inspected;

(2) Were any bags opened and contents examined, and if so, how many bags were opened;

(3) Of what did the examination consist, that is, whether visual, by feeling, testing mechanically or chemically, tasting or otherwise.

(h) How many bags were found damaged;

(i) What was the nature of the alleged damage;

(Deposition of Jorge Ferreira.)

(j) Was the damage uniform on each bag or did it vary, and if so, explain in detail how it varied;

(k) What was the wet area on each bag, that is, how much was wet and was it wet on the top, the bottom, the sides or the ends;

(l) What was the extent of the wet penetration into the flour;

(m) What the wet portion of the flour spoiled or unfit for use and if so, please explain why.

Eleventh—To the Eleventh Cross-Interrogatory he says:

(a) Sacks began to arrive on February 22, 1946. The [75] hours were 7:00 a.m. to 4:00 p.m., with one hour for lunch.

(b) The flour was on railway cars being transferred from the cars to the warehouse.

(c) It was stacked on open railroad cars.

(d) No.

(e) Fifteen or sixteen laborers, three checkers and I were present at the time.

(f) By three checkers as indicated above.

(g) (1) The entire shipment was inspected, but I do not know the number of bags; (2) None were opened; (3) The examination was visual and tactile.

(h) I do not know the exact number, but estimate about three thousand bags.

(i) The sacks were wet.

(j) The damage varied; some bags were wet on top, others on the bottom or sides, and others completely wetted.

(Deposition of Jorge Ferreira.)

(k) Some bags were wet on top, others on the bottom or sides, and others completely wetted.

(l) Penetration was varying, but I am unable to give a definite statement since I did not open the sacks.

(m) As I said before, I did not open the bags and therefore I cannot state definitely what portion was spoiled.

Cross-Interrogatory No. 12: Did you segregate the wet sacks and the sound sacks? [76]

Twelfth—To the Twelfth Cross-Interrogatory he says:

Yes.

Cross-Interrogatory No. 13: Were all of the wet sacks opened and inspected?

Thirteenth—To the Thirteenth Cross-Interrogatory he says:

At the time of which I speak, no.

Cross-Interrogatory No. 14: If all wet sacks were opened, was the flour in each sack separated as to sound and damaged flour within each sack?

Fourteenth—To the Fourteenth Cross-Interrogatory he says:

I did not open the wetted bags, which were sent to the mill.

Cross-Interrogatory No. 15: If it was not separated as mentioned in the previous cross-interrogatory, how was your determination made as to the extent of damage?

Fifteenth—To the Fifteenth Cross-Interrogatory he says:

(Deposition of Jorge Ferreira.)

I did not make a determination of the extent of the damage.

Cross-Interrogatory No. 16: If in answer to Cross-Interrogatory No. 12 you have stated a percentage of damaged flour in wet sacks, please state how this percentage figure was determined to be accurate.

Sixteenth—To the Sixteenth Cross-Interrogatory he says:

No percentages were stated.

Cross-Interrogatory No. 17: Have you ever had [77] experience with or made a test of a sack of flour totally immersed in water for, say, from 12 to 24 hours, to determine the extent or percentage of water damage to such a sack of flour?"

Mr. Howard: Libelant objects to that question. As I recall, the answer is "No," but for the sake of the record at this time I object to the question as not being within the proper scope of direct examination.

The Court: Is it not meant to test the witness' knowledge as to damage by wetting?

Mr. Wakefield: That was the purpose.

The Court: The objection is overruled.

"Seventeenth—To the Seventeenth Cross-Interrogatory he says:

I have never made such a test.

* * *

Cross-Interrogatory No. 19: What was done with the wet sacks of flour?

(Deposition of Jorge Ferreira.)

Nineteenth—To the Nineteenth Cross-Interrogatory he says:

They were sent to the mill.

Cross-Interrogatory No. 20: Was any attempt made to recondition the damaged portion of the flour and if so, what did you or the company do in this respect?

Twentieth—To the Twentieth Cross-Interrogatory he says: [78]

I only know that this flour was sent to the mill.

Cross-Interrogatory No. 21: Was the damaged portion of the flour (1) sold; (2) offered for sale, or (3) otherwise used by the company and please explain in detail how the damaged flour was disposed of by the company.

Twenty-First—To the Twenty-First Cross Interrogatory he says:

The damaged portion was not sold, and I do not know how it was disposed of.

Cross-Interrogatory No. 22: Is the claim of 35% of damage to flour in the wet sacks based upon a total loss of the said 35% damaged flour or was some value realized from the damaged portion of the flour?

Twenty-Second—To the Twenty-Second Cross Interrogatory he says:

I have no knowledge regarding this question.

Cross-Interrogatory No. 23: Are there records or published prices of fifty kilo bags of Aida Brand wheat flour applicable to the months of February

(Deposition of Jorge Ferreira.)

or March, 1946, at Rio de Janeiro, as sold by the mills or companies such as Companhia Luz Stearica?

Twenty-Third—To the Twenty-Third Cross-Interrogatory he says:

I have no records, but the company has them.

Cross-Interrogatory No. 24: State what that price was and furnish a copy of the record or published price list of such flour.

Twenty-Fourth—To the Twenty-Fourth Cross-Interrogatory he says: [79]

I do not know the price and am unable to furnish the desired record.

Cross-Interrogatory No. 25: To whom did Companhia Luz Stearica sell its flour in March, 1946?

Twenty-Fifth—To the Twenty-Fifth Cross-Interrogatory he says:

I do not know.

Cross-Interrogatory No. 26: On what basis was such flour sold as to the size of sacks, the brand or other basis of sale?

Twenty-Sixth—To the Twenty-Sixth Cross-Interrogatory he says:

I do not know.

Cross-Interrogatory No. 27: What was the actual selling price per sack of flour as is involved in this action and which was not damaged?

Twenty-Seventh—To the Twenty-Seventh Cross-Interrogatory he says:

I do not remember.

Cross-Interrogatory No. 28: How does this price

(Deposition of Jorge Ferreira.)

compare with the landed cost to the company at Rio de Janeiro?

Twenty-Eighth—To the Twenty-Eighth Cross-Interrogatory he says:

I have no information on this point.

Cross-Interrogatory No. 29: Was there a strong demand for wheat flour in Rio de Janeiro in March, 1946?

Twenty-Ninth—To the Twenty-Ninth Cross-Interrogatory he says:

Yes.

Cross-Interrogatory No. 30: Was the price higher [80] or lower than normal?

Thirtieth—To the Thirtieth Cross-Interrogatory he says:

The price was fixed by regulation.

Cross-Interrogatory No. 31: Was there an adequate supply of wheat flour, or was there a scarcity at this time—March, 1946?

Thirty-First—To the Thirty-First Cross-Interrogatory he says:

There was a slight scarcity, but the demand was met largely by importations. Noticeable shortages occurred when shipments failed to arrive for any reason."

Mr. Howard: That concludes the deposition of Mr. Ferreira. Libelant offers that in evidence as part of its case in chief.

The Court: That deposition is received as part of libelant's case in chief.

Mr. Howard: Next, Your Honor, libelant will call the witness by deposition Frederick Albert Carl Rols Herold.

DEPOSITION OF FREDERICK HEROLD

Direct Examination

“Interrogatory No. 1: Please state your name, age, nationality and where you now reside?

First—To the First Interrogatory he says:

Frederick Albert Carl Rolf Herold, 49 years, British, Avenida Epitacio Pessoa, No. 3712, apartment 203, Leblon, [81] Rio de Janeiro, Brazil.

Interrogatory No. 2: State by whom, where, and in what capacity you were employed in February and March, 1946.

Second—To the Second Interrogatory he says:

I am employed by Moinho da Luz, a division of Cia. Luz Stearica, at Rua do Rosario, No. 160, office of Moinho da Luz division. I was accountant.

Interrogatory No. 3: State for how long you have been employed in the above capacity; also whether you are still employed by the same concern and in the same capacity.

Third—To the Third Interrogatory he says:

Since July 1, 1941, and am still in it, exercising the same function.

Interrogatory No. 4: State the duties of your employment and what experience and training you have in connection with the position which you held in February and March, 1946.

Fourth—To the Fourth Interrogatory he says:

(Deposition of Frederick Herold.)

General supervision of all accounting matters. I had had over twenty years' accounting experience at that time.

Interrogatory No. 5: Are you familiar with a certain shipment of 10,500 bags of wheat flour consigned to Companhia Luz Stearica and shipped on board the S.S. "Sweepstakes" from New York, arriving at Rio de Janeiro about February 20, 1946; and state generally what your [82] duties or activities were with respect to such shipment.

Fifth—To the Fifth Interrogatory he says:

Yes, I am aware of it. My duties were to deal with the accounting procedure in recording invoices, subsequent payment of the drafts, etc.

Interrogatory No. 6: Please state the date or dates upon which this shipment of flour arrived at the consignee's mill or warehouse from the vessel.

Sixth—To the Sixth Interrogatory he says:

[Here witness consulted notes.]

Between February 22 and March 1, 1946, both dates inclusive.

Interrogatory No. 7: Describe the warehouse or structure in which the shipment of flour was stored by consignee in February and March, 1946, including in detail the type and condition of flooring, walls and roof, and the presence or absence of dampness within the structure by reason of leakage or otherwise at that time.

Seventh—To the Seventh Interrogatory he says:

I cannot reply to this question. On the few

(Deposition of Frederick Herold.)

occasions when I have visited the warehouse, I recall noting that it was a concrete structure, part of a unit which included mill proper, silos and, I believe, offices.

Interrogatory No. 8: For what purpose was the warehouse or structure designed, in which this shipment of [83] flour was stored by consignee?

Eighth—To the Eighth Interrogatory he says:

I do not know in what building the shipment was stored, and therefore I cannot reply to this question.

Interrogatory No. 9: Have you ever experienced difficulty with flour becoming damp or damaged by wetness while stored in the above-described warehouse?

Ninth—To the Ninth Interrogatory he says:

Not as far as I am aware.

Interrogatory No. 10: Did you inspect the bags of flour in this shipment upon arrival at consignee's warehouse, to determine the extent of damage sustained to the flour by wetness?

Tenth—To the Tenth Interrogatory he says:

Definitely not.

Interrogatory No. 11: Did you supervise an inspection of this shipment of flour at consignee's warehouse to determine the extent of damage sustained by wetness?

Eleventh—To the Eleventh Interrogatory he says:
No.

(Deposition of Frederick Herold.)

Interrogatory No. 13: Were you present at consignee's warehouse in Rio de Janeiro when Dr. Antonio Barreto inspected and sampled the bags of flour in this shipment to determine the extent of damage sustained by wetness? [84]

Thirteenth—To the Thirteenth Interrogatory he says:

No.

Interrogatory No. 14: Dr. Barreto has stated that he found the wetness or dampness in each bag of damaged flour to be 35% of the total quantity. Please state whether you concur in that finding, and whether you concurred in Dr. Barreto's finding at the time he made his determination. If you did not concur at that time, or do not now concur with such determination by Dr. Barreto, please explain in detail the reason therefor.

Fourteenth—To the Fourteenth Interrogatory he says:

I have no opinion to offer, since I never see the flour. All claims and surveys are made on the spot, and damages agreed to by the people or company making the survey with the mill officials.

Interrogatory No. 15: State the total number of sacks of flour which were found to be damaged by wetness upon arrival of the shipment at consignee's warehouse.

Fifteenth—To the Fifteenth Interrogatory he says:

[Here witness consulted notes.]

(Deposition of Frederick Herold.)

3,087. Other bags (197) were torn, but no mention is made of them, and as far as I recall, they were not covered by insurance.

Interrogatory No. 16: Was it possible to sell the sacks of flour mention in Interrogatory No. 15 in their [85] condition as delivered to consignee's warehouse, without reconditioning the same?

Sixteenth—To the Sixteenth Interrogatory he says:

We have never done so, and I believe that this is prohibited by law. We have never sold any damaged flour.

Interrogatory No. 17: State what was done by consignee with respect to disposition of the flour in this shipment after damage by wetness to a portion thereof was discovered.

Seventeenth—To the Seventeenth Interrogatory he says:

I cannot say definitely what was done with this shipment, since I was not present, but I understand that all damaged flour is separated manually.

Interrogatory No. 18: Was it possible to sell that portion of the flour in the bags which was damage by wetness, and if so, to whom and for what price?

Eighteenth—To the Eighteenth Interrogatory he says:

I understand this question to refer to the flour actually damaged by water; if so, I believe it is quite unsaleable. I understand that it is always thrown away.

(Deposition of Frederick Herold.)

Interrogatory No. 19: Describe in detail the proceeding or method used in reconditioning the marketable flour after separation from damaged flour. Nineteenth—To the Nineteenth Interrogatory he says:

Again I cannot reply from my own observance but I am [86] led to believe that remaining good flour is sent into the mill for remixing purposes, to be mixed with other good flour being milled.

Interrogatory No. 20: If you have a record of the exact quantities of flour recovered from the damaged bags and reconditioned, please state the amounts recovered. If no such figures are available, explain why it is not possible for you to furnish such data.

Twentieth—To the Twentieth Interrogatory he says:

No such records are available and I obviously cannot say why it is not possible to furnish them. Our company is a flour-milling company and in normal times it does not import flour but only wheat.

Interrogatory No. 21: Please state what the actual value was between February 22 and March 1, 1946, at Rio de Janeiro of a fifty-kilo bag of Aida brand wheat flour, based upon the price for which the consignee could sell such flour on the open market at that time and place.

Twenty-First—To the Twenty-First Interrogatory he says:

(Deposition of Frederick Herold.)

According to our records the selling price was 137 cruzeiros (Cr\$137,00) per sack of fifty kilos.”

Mr. Wakefield: If the Court please, at this point and with respect to Interrogatory No. 21 and the answer, I want to interpose an objection which does not appear [87] until the cross-examination, but based upon the cross-examination which will appear, I want to object to it as it appears that the witness has no information or knowledge that the price was fixed by Government order. He was asked to furnish a copy of such order or other record concerning the price, which he failed to do, and therefore I want to note my objection because after the cross-examination is read I will want to come back and move to strike the answer to Interrogatory No. 21.

The Court: On what ground?

Mr. Wakefield: On the ground that the cross-examination shows that the man does not have knowledge, and he fails to furnish a copy of the price or the regulation which was demanded.

The Court: Proceed. We will deal with that when we come to it.

Mr. Howard: At this point I might advise the Court that Mr. Wakefield has agreed by oral stipulation that the rate of exchange that can be considered as applicable on the cruzeiros that are mentioned in this and subsequent interrogatories is 20.10; in other words, 20.10 cruzeiros equal \$1.00 U. S. funds. That will mean some slight deviation in the figures I advised Your Honor on Friday.

(Deposition of Frederick Herold.)

The Court: Will you remind me of that in the course [88] of argument?

Mr. Howard: Yes, Your Honor.

“Interrogatory No. 22: What was the delivered cost per fifty-kilo bag of the flour in this shipment to the consignee, based upon the invoice cost and charges for ocean freight and insurance? Please indicate any other incidental charges that are considered by the consignee in arriving at the delivered cost per bag of flour in this shipment.

Twenty-Second—To the Twenty-Second Interrogatory he says:

10,500 bags of flour of 50 kilos—“Sweepstakes”

US\$49,867.25 at 20,10	Cr\$ 1.002.331,80
Stamps on request for exchange ...	3.892,80
Customs clearance	7.654,00
Port discharging	10.256,60
Discharge checking expenses	3.973,80
Transport to mill	3.614,70

TotalCr\$ 1.031.723,70
 Cost per sack: Cr\$98.25⁹⁴.

Cross-Interrogatories

Cross-Interrogatory No. 1: When and in what manner and by whom was the matter of your giving this deposition first brought to your attention?

First—To the First Cross-Interrogatory he says:

I can't recall the date. It was brought to my attention by a representative of the Cia. Immobiliaria

(Deposition of Frederick Herold.)

Financeira [89] Americana, who are representatives of the underwriters, by a personal visit, the representative of the company calling at our office.

Cross-Interrogatory No. 2: With whom and when did you first discuss the matters you have testified to in this deposition? Please explain in detail.

Second—To the Second Cross-Interrogatory he says:

I can't recall the date, but I discussed the matters with Dr. Hugo Delamare, who is our mill manager at the time it was brought to my notice. I believe this was two or three months ago, but I cannot say exactly.

Cross-Interrogatory No. 3: Have you been testifying from memory or did you make some record of these matters at the time they occurred?

Third—To the Third Cross-Interrogatory he says:

I made no record at the time the matter occurred. I am testifying from knowledge, aided by one or two notes dealing with specific figures.

Cross-Interrogatory No. 4: If you have refreshed your memory from records, please state what these records are and when made and where they have been kept since you made them.

Fourth—To the Fourth Cross-Interrogatory he says:

The date of entry I have taken from daily statements received from the mill; the cost of the flour I have taken [90] from our accounting records. These records are kept at our office at Rua Rosario,

(Deposition of Frederick Herold.)

No. 160, and they were made on the occasion, in February or possibly March, 1946.

Cross-Interrogatory No. 5: How many shipments of flour similar to the shipment in question which arrived on the S.S. Sweepstakes about February 20, 1946, does Companhia Luz Stearica receive in a year's time?

Fifth—To the Fifth Cross-Interrogatory He Says:

As mentioned above, we are not normally flour importers and there have been occasions when, to the best of my knowledge and belief, not a single shipment has been received in a year's time.

Cross-Interrogatory No. 6: Do you inspect all flour received by Companhia Luz Stearica and if so, state how many lots of flour you have inspected since March, 1946, to date.

Sixth—To the Sixth Cross-Interrogatory He Says:

No, I do not inspect any of them.

* * *

Cross-Interrogatory No. 12: Did you segregate the wet sacks and the sound sacks?

Twelfth—To the Twelfth Cross-Interrogatory He Says:

I did not.

Cross-Interrogatory No. 13: Were all of the wet sacks opened and inspected? [91]

Thirteenth—To the Thirteenth Cross-Interrogatory He Says:

I cannot say. [92]

* * *

(Deposition of Frederick Herold.)

Cross-Interrogatory No. 19: What was done with the wet sacks of flour?

Nineteenth—To the Nineteenth Cross-Interrogatory
He Says:

From my own knowledge, I cannot say.

Cross-Interrogatory No. 20: Was any attempt made to recondition the damaged portion of the flour and if so, what did you or the company do in this respect?

Twentieth—To the Twentieth Cross-Interrogatory
He Says:

As far as I know, no. The good flour is returned to the mill for re-mixing in such cases and even this statement I make on the basis of general knowledge, since I have never seen it happen.

Cross-Interrogatory No. 21: Was the damaged portion of the flour (1) sold; (2) offered for sale, or (3) otherwise used by the company and please explain in detail how the damaged flour was disposed of by the company?

Twenty-First—To the Twenty-First Cross-Interrogatory He says:

1. No. [94]
2. No.
3. No. The damaged flour was thrown away.

Cross-Interrogatory No. 22: Is the claim of 35% of damage to flour in the wet sacks based upon a total loss of the said 35% damaged flour or was some value realized from the damaged portion of the flour?

(Deposition of Frederick Herold.)

Twenty-Second—To the Twenty-Second Cross-Interrogatory he says:

I gather that it was based on an estimated figure. No value was realized from the damaged portion.

Cross-Interrogatory No. 23: Are there records or published prices of fifty kilo bags of Aida Brand wheat flour applicable to the months of February or March, 1946, at Rio de Janeiro, as sold by the mills or companies such as Companhia Luz Stearica?

Twenty-Third—To the Twenty-Third Cross-Interrogatory He Says:

I don't think there are published prices. Prices of flour in recent years have been fixed by the Central Price Commission both for manufactured and imported flour. We sell our flour at those prices.

Cross-Interrogatory No. 24: State what that price was and furnish a copy of the record or published price list of such flour.

Twenty-Fourth—To the Twenty-Fourth Cross-Interrogatory He Says:

I cannot furnish a record, but as I have stated, I believe the prices to have been 137 cruzeiros per bag of [95] fifty kilos of this brand or type."

Mr. Wakefield: If the Court please, that is the answer that I wish to move to strike, the answer to Cross-Interrogatory No. 24, and also the answer to direct Interrogatory No. 21, for the reason that the answer to Cross-Interrogatory No. 23 shows that the price of imported wheat flour at Rio de Janeiro

was governed by a Government agency, to wit, the Central Price Commission, at this time and was fixed. That is similar, I take it, to our OPA.

In his answer to Cross-Interrogatory No. 24, he says he believes the price was 137 cruzeiros per fifty kilo bag, and that relates back to his answer to direct Interrogatory No. 21, where he says without qualification that it was that much per bag, for this reason: In the first place, if the price is a matter of public record, fixed by the Central Price Commission, that is definitely the best evidence. Here where we are thousands of miles away and must rely on these depositions, I take it that we are entitled to be at least reasonably technical about these matters, because my cross-interrogatory asks for a copy of the record or published price list, and the witness has failed to furnish that. [96]

His answer is, "I believe" it was so and so. He is testifying almost four years after this date of March, 1946, and to permit to stand in a deposition as testimony the fact that he believes it was so and so, when it is shown by his own testimony that it is a fixed price by a Government agency, and where I asked for a copy of it, I think is entirely improper, incompetent and prejudicial to the respondent's case. We can't cross-examine his recollection, and where it is shown by his own statement that there is a record of it, to wit, the Central Price Commission having fixed it, I take it that should be stricken, that he believes it was 137 cruzeiros.

The Court: Has the libelant adopted any other means or method of proof on this issue?

Mr. Howard: This is the only sworn testimony on that, Your Honor. I will say this, that at an earlier stage in this proceeding, when certain interrogatories were propounded to us by Mr. Wakefield for answer on behalf of libelant, I answered at that time that the corresponding figure would be 126 cruzeiros.

The Court: The statement here is 137.

Mr. Howard: 137, yes, Your Honor. In answer to interrogatories, I had made the statement that, "Sound market value at Rio de Janeiro, duty paid, of each bag [97] of American wheat flour weighing 50 kg. as of date of discharge was Cruzeiros 126.00." I did not make that statement at that time on the basis of this witness' testimony; I made it on the basis of reports we secured from our correspondents at New York who advised us that was the sound market value.

The Court: And this is at variance with that statement?

Mr. Howard: To the extent of 11 cruzeiros. I am willing, if counsel objects to this, to limit my proof on damages to the statement I previously made on answers to interrogatories, namely, 126 cruzeiros. Neither one of us knew of this answer until this deposition was received, as of Monday, a week ago today.

The Court: Have you any objection to the proposal made by Mr. Howard? Do you object to his doing so in view of the surprise answer, surprise not only to you but to Mr. Howard? Mr. Howard

should be entitled to have some proof of the allegation, and if he in good faith relied upon this as being some evidence of the allegation before opening this deposition, you can plainly see the disadvantage, can you not?

Mr. Wakefield: Definitely.

The Court: Otherwise, he might say, "I ask a continuance of the trial for the purpose of getting other [98] testimony on this matter of selling price." I do not know that his request to that effect would be granted, but you can see what position he might be put in.

Mr. Wakefield: I realize that. That is why we had the continuance before, so he could get this testimony, but it is his burden of proof to prove market value or landed value or invoice value.

The Court: Have you any information which makes you believe that it would be injurious to the best interests of your client to make admission that the price was as stated in his client's answer to your interrogatory?

Mr. Wakefield: The only thing I can answer to that, Your Honor, is that I don't know. I haven't any idea what the price is.

The Court: For the purpose of the case, what is your attitude?

Mr. Wakefield: My attitude is that it is his burden of proof, and he had a continuance from Your Honor once; now he is back here without adequate proof the second time.

Mr. Howard: Will Your Honor hear from libel-

ant as far as the objection made to this and the motion to strike as to these interrogatories?

The Court: When do you want to be heard?

Mr. Howard: Right now.

Mr. Wakefield: May I make one more statement? Mr. Crutcher called my attention to the fact that in answer to direct interrogatory No. 21, which is the one I am objecting to, coupled with cross-interrogatory No. 24, he said, "According to our records the selling price" was so and so. Then I asked him to produce those records and he said that the price was fixed by the Central Price Commission, and then he said he thinks it was 137 cruzeiros. He was given the opportunity to produce records.

The Court: But he said he couldn't do it, and I am not so sure but what he would not be permitted to state his best recollection of what the records show in that case, unless you have evidence that his answer that he couldn't produce the record was a dishonest answer. Is that your position?

Mr. Howard: That is part of it, that the libelant through his representative is entitled to state what the market value of a commodity is at any particular place. It is not necessary, as counsel has suggested, to bring in an official record in order to prove it. The courts have held many times that a suing party may prove the value of a commodity or an article by testimony of his own people as to the value. [100]

The Court: Is this man an officer?

Mr. Howard: He is an accountant for the libelant corporation.

The Court: Is he their regular accountant? Do you know how many they have?

Mr. Howard: It would appear from the answers he has already given in this deposition that he has been an accountant since 1940 or 1941.

The Court: Is he their chief accountant, the one in charge of their accounting department?

Mr. Howard: It does not state definitely one way or the other. It is my impression that he was.

As to the proof of the value, he was asked to furnish a copy of the record or public price list. He has previously said that the price was fixed by the Central Price Commission. Counsel criticizes his answer because he didn't furnish a copy of that record. It seems logical to me that the witness wouldn't have available to him a copy of that record, particularly when he is called upon to testify on written interrogatories, to go to the American Consulate at Rio de Janeiro. He may not have had it with him, may not have anticipated need for such a record, and there may not have been any record he could possibly obtain on it.

He has testified not once but twice in this [101] deposition that the value was 137 cruzeiros. It seems to me the fact that we are calling on this witness many thousands of miles away in a foreign country to testify on written interrogatories entitles some liberality rather than some strict technical interpretation of the rules as far as proof and the particular question of evidentiary value involved in the motion to strike these answers. This being an admiralty

proceeding, I think all those things should be considered. If there is any question in the Court's mind, it seems to me it should be resolved in favor of the witness, who has not once but twice given an answer as to the question of value.

The Court: Mr. Wakefield?

Mr. Wakefield: I would say this, Your Honor. What Mr. Howard says is his dilemma applies to me also. I would like to cross-examine this man.

Your Honor has had experience in cases involving the OPA. You would not permit a witness on the stand to say what the OPA price was on a certain commodity, and that is just what this fellow has done, only he doesn't even do that. His testimony is, "I believe the price to have been 137."

Now, when it comes to landed price, he has put down here in great detail all of the items making up the landed cost, including the delivery to the mill and [102] everything else, and he comes up with 98.25 cruzeiros as the landed cost, and he breaks it all down, which is taken from their records. I do not object to that price because that in my opinion is properly proven, and if counsel wants to rely on that price it is all right, but in justice to my client I can't say that I will admit it was 137 cruzeiros, I will admit it was 126 cruzeiros.

I submit that if he has not proven it in the manner in which the law says he should prove it, by the best evidence or credible evidence, that Your Honor should not receive it. I think Your Honor can receive the landed cost, because that is proven from their records in detail.

The Court: Is the landed cost in this same witness' deposition?

Mr. Crutcher: Yes, Your Honor.

The Court: In answer to interrogatory No. 22, is that right?

Mr. Crutcher: That is correct.

The Court: I have an opinion upon this, but I will hear from Mr. Crutcher.

Mr. Crutcher: Your Honor, I would like to add one additional thought. I would like to point out that these interrogatories were discussed with Mr. Herold some months before the formal interrogation began, and [103] it was no doubt in anticipation of that that he provided the detailed data which went to make up this landed cost. He also said on direct interrogatories that he got the market price, that is, the fixed Government price, from his records, and it seems preposterous that in doing so and being apprized of the necessity for producing them he did not bring the record of value as well as the record of landed cost.

The Court: I think that the witness in cross-examination has justified the Court's permitting the answer to stand. I think he has made a technical qualification for the application of secondary evidence in lieu of the best. He stated on direct examination the record information, and then on cross-examination by written interrogatories, just the same form as the direct examination was in, that while he did not have the records with him, he believed what he now says and in effect what he

previously said in his direct examination. I believe that that raises to admissibility the secondary evidence, namely, his recollection of what the record showed, and that I believe is a technical qualification for the answer.

However, I believe also that the circumstances of this being a deposition taken upon written interrogatories in a foreign country, and it being in an admiralty case, [104] that the strictest rigidity of the best evidence rule should not here be applied. After all, this deposition is taken upon written interrogatories; it is not taken on oral. If counsel on either side desire to cross-examine this witness' qualifications for stating the secondary evidence, they had a right to take his deposition by oral interrogatories instead of written, if they wished to do so. Both sides elected to take the deposition upon written interrogatories, and I do not believe there should be applied to this situation the same rigid requirement as to secondary evidence which we might feel that it was appropriate to apply if the witness was on the stand being cross-examined, or if he had been then and there upon the stand subject to oral examination.

The objection is overruled.

DEPOSITION OF FREDERICK HEROLD

Cross-Examination

(Continued)

“Cross-Interrogatory No. 25: To whom did Companhia Luz Stearica sell its flour in March, 1946?

(Deposition of Frederick Herold.)

Twenty-Fifth—To the Twenty-Fifth Cross-Interrogatory He Says:

To many different bakers. Our customers total several hundred since we supply flour not merely to Rio de Janeiro but throughout Brazil. We ship to agents and representatives in the interior and in the north of Brazil.

Cross-Interrogatory No. 26: On what basis was such [105] flour sold as to the size of sacks, the brand or other basis of sale?

Twenty-Sixth—To the Twenty-Sixth Cross-Interrogatory He Says:

Normally, for manufactured flour, our standard weight is fifty kilo bags though we have also sold in twenty-five and five kilo bags, and one kilo bags for household use. In the case of imported flour, we sell according to the weights of such bags which may be seventy kilo, fifty kilo, or hundred pounds, English weight. In other words, we sell them as we receive them, as we are permitted to do.

Cross-Interrogatory No. 27: What was the actual selling price per sack of flour as is involved in this action and which was not damaged?

Twenty-Seventh—To the Twenty-Seventh Cross-Interrogatory He Says:

137 cruzeiros per bag.

Cross-Interrogatory No. 28: How does this price compare with the landed cost to the company at Rio de Janeiro?

Twenty-Eighth—To the Twenty-Eighth Cross-Interrogatory He Says:

(Deposition of Frederick Herold.)

The landed cost of this ship was Cr \$98.2594.

Cross-Interrogatory No. 29: Was there a strong demand for wheat flour in Rio de Janeiro in March, 1946?

Twenty-Ninth—To the Twenty-Ninth Cross-Interrogatory He Says:

I think so.

Cross-Interrogatory No. 30: Was the price higher or lower than normal? [106]

Thirtieth—To the Thirtieth Cross-Interrogatory He Says:

During my period with the company I have seen flour go from fifty cruzeiros a bag to about 260 or 270 cruzeiros. The price at the time was fixed by a Central Price Commission, as it still is. The March, 1946, price was substantially lower than the present-day price."

The Court: Is that selling price?

Mr. Wakefield: The question does not state selling price or landed price. It must be the selling price.

The Court: The selling price to the consignee at Rio de Janeiro is 98.2594?

Mr. Wakefield: That is correct, Your Honor.

The Court: It is the same figure that was given in his direct examination, is it not?

Mr. Wakefield: Yes, Your Honor.

"Cross-Interrogatory No. 31: Was there an adequate supply of wheat flour, or was there a scarcity at this time—March, 1946?

(Deposition of Frederick Herold.)

Thirty-First—To the Thirty-First Cross-Interrogatory He Says:

During the past three of four years supplies of wheat flour have been less than normal compared to the period prior to the war. On several occasions we have been entirely without stocks of wheat, as opposed to wheat flour. I cannot [107] recall the exact situation at this time, March, 1946.”

Mr. Howard: That concludes the deposition of Mr. Herold. Libelant offers that in evidence.

The Court: It is received as part of libelant’s case in chief.

I will have to excuse counsel until tomorrow morning following the term day proceedings, substantially 10 o’clock. Court is adjourned until tomorrow morning at 10 o’clock.

(At 4:15 o’clock p.m., Monday, October 31, 1949, proceedings recessed until 10 o’clock a.m., Tuesday, November 1, 1949.)

November 1, 1949

The Court: You may resume the trial proceedings.

Mr. Howard: At this point libelant rests its case in chief.

The Court: Libelant rests. The respondent may now proceed.

Mr. Wakefield: If the Court please, I won’t belabor [108] the point, but for the record on behalf of respondent United States I would like at this

time to challenge the sufficiency of the libelant's evidence with respect to, first, proof that damage was done by the respondent; and secondly, with respect to sufficiency of any proof as to the extent of damage; and third, as to the sufficiency of proof offered as to the value of any damage which may have been proven.

We feel that libelant has failed to make out a case and that the Court should make a determination in favor of respondent on libelant's testimony.

The Court: The challenge is overruled and the motion is denied.

Mr. Wakefield: The respondent at this time will call as its first witness Howard Francis Lane, master of the Sweepstakes, who testified by deposition.

DEPOSITION OF HOWARD FRANCIS LANE

(Mr. Prem appearing for libelant, Mr. Lord appearing for respondent.)

"Direct Examination

By Mr. Lord:

Q. Captain Lane, are you now staff captain of the Steamship Brazil? A. Yes, sir.

Q. Do you expect to leave the Port of New York on [109] Friday, October 8th?

A. That is right.

Q. Were you master of the Steamship Sweepstakes on a voyage from New York to South American ports beginning in February, 1946?

A. That is true.

(Deposition of Howard Francis Lane.)

Q. When did you first join the Sweepstakes?

A. I was on the Sweepstakes during the war. That was around 1944.

Q. Did you sail on her as master?

A. I sailed on her as master at that time.

Q. What type of vessel was the Sweepstakes?

A. The Sweepstakes was a C-2, SJ-1, or a Wilmington, North Carolina, built C-2, which varies from the West Coast, Moore-McCormack type, San Francisco built C-2.

Q. How many hatches did she have?

A. Five hatches.

Q. How many decks?

A. An upper tween deck and a lower tween deck and a main lower hold.

Q. Were there any deep tanks?

A. Deep tanks for carriage of oil were never completed but the framing of the deep tanks was situated in the No. 2 lower hold.

Q. Were there deep tanks elsewhere? [110]

A. No other deep tanks.

Q. What type of ventilating equipment did this vessel have?

A. Blower system for intake and also for exhaust.

Q. No cowl type ventilators?

A. No cowl type. The intake and exhaust were situated on top of the king posts.

Q. You mentioned, captain, that you joined the Sweepstakes in 1944 as I understood?

(Deposition of Howard Francis Lane.)

A. Yes.

Q. To skip over your early time on the Sweepstakes, captain, what voyage did this vessel make immediately prior to the voyage in question?

A. Prior to the South American trip we made a voyage to Marseilles, France, from New York with a full load of sugar for the Army. From Marseilles we went to Naples, Italy. At Naples, Italy, we loaded the war equipment of the Brazilian Expeditionary Force to bring to Rio de Janeiro.

Q. Did you have any claims for damage for the sugar?"

Mr. Howard: At this point I object to that question. It is a question directed to the master of this vessel, interrogating him as to claims for damage for sugar carried on a previous voyage. I submit whether or not they had any claims for damage on a previous voyage had [111] no bearing on the claim made by libelant in the present case. Before Your Honor rules on that, I would like an opportunity to cite authorities I have on that question.

Mr. Wakefield: If this were a case where the damage to this flour was discovered upon discharge from the vessel, so that there was no issue in this case but that the damage did occur on the ship, we would have a different situation, but here is a case where the flour is discharged, no one sees any damage, no damage is noted until ten days after the discharge has been completed, and a respondent in that position is entitled, in my opinion, to show all the facts.

(Deposition of Howard Francis Lane.)

True, the weight of this testimony in Your Honor's mind may not be very great, but what we come before Your Honor with is a showing of all facts. As this deposition proceeds, you will see we have tried to show the whole picture to enable the Court to determine whether there was any possibility or probability of even remote cause or probable cause of damage on this voyage.

I think that it is relevant to the extent that the Court wishes to give weight to it, because we are put to it to show the impossibility of any such damage, or the unlikelihood of any such damage, because we had none on the voyage in question, none on the preceding voyage, none on the subsequent voyage, no repairs were made to [112] the ship, the ventilators were on top of the king post, and we are trying to show the whole picture. To that extent, I think it is proper.

The Court: It would be helpful to the Court if I had some authorities in support of your position, Mr. Wakefield.

Mr. Wakefield: I didn't consider that the issue would be raised, Your Honor. I am not here prepared to argue something that I did not anticipate.

The Court: The Court sustains the objection. You will have to pass the questions and answers which relate to that point.

Mr. Wakefield: I make an offer of proof with respect to the evidence——

The Court: You may do that now.

(Deposition of Howard Francis Lane.)

Mr. Wakefield: ——which Your Honor has excluded, and that will include the reading of the next question.

The Court: You may do that.

Mr. Wakefield: “Q. Did you observe the condition of the cargo at Marseilles?”

Mr. Howard: Same objection, Your Honor.

The Court: I think you should state in your words the substance of what you wish to prove, rather than reading the questions and answers. Otherwise, by reading the questions and answers, you might get the same evidence [113] in the Court’s mind. I do not think it is necessary for the Court to hear the questions and answers. You can say what you offer to prove by this witness, if you wish. One way to get at it, I suggest, would be, “I offer to prove by the questions and answers,” from certain lines to certain lines, in substance, that so and so——

Mr. Wakefield: Under that admonition of the Court, I offer to prove by this witness and the questions and answers contained in the deposition that on this voyage to which the witness is testifying, being the voyage immediately preceding the voyage on which the alleged damage occurred, that the vessel discharged its cargo at Marseilles, France, in 100% condition; that there was no loss or damage on account of sweat or water damage; and that on this voyage there was no evidence of any leaking of the hull or deck plates in any respect.

(Deposition of Howard Francis Lane.)

The Court: I will say this, Mr. Wakefield, that if you find during the noon hour that you have some authority to support your position, I will interrupt the proceedings to hear that, and Mr. Howard may be ready to offer countervailing authorities in support of his position in that event.

Mr. Wakefield: There is one question——

The Court: I understand there is an objection to your offer. [114]

Mr. Howard: Yes, Your Honor. My objection to the offer will be the same as previously expressed to the question.

The Court: The objection is sustained.

Mr. Wakefield: There is one question which is framed with respect to the prior voyage, but the answer has to do with the characteristic of the vessel as such and is therefore, in my opinion, quite material. I will read the question and answer.

“Q. During that voyage, was there any evidence of the vessel leaking from the hull or deck plates?

“A. No.”

Mr. Howard: I object to counsel reading that question and answer. I think the objection I previously made and the Court's ruling extends to that question, and particularly the answer to it.

The Court: Unless you have something else to offer on this point that you did not on the other, the Court is ready to rule on it.

Mr. Wakefield: The answer pertains to the characteristics of the vessel as a ship, not the voyage or any voyage.

(Deposition of Howard Francis Lane.)

Mr. Howard: I am willing to stipulate with counsel that the vessel was a fully welded vessel.

Mr. Wakefield: That is the point, if counsel agrees [115] then we can pass that. It was a fully welded vessel with no rivets.

“Q. Did this ship have hatch boards?

A. It has hatch boards in the upper and lower tween deck and the upper deck has pontoons.

Q. How are these pontoons handled?

A. In the No. 1 hatch we had eight steel pontoons which were lifted out by the cargo gear.

Q. What cargo did you carry from Naples?”

Mr. Howard: My objection runs to that question and the following questions dealing with the previous voyage.

Mr. Wakefield: In connection with my offer, I offer to prove by this witness, in addition, that on the voyage from Naples to Rio de Janeiro, being the immediately preceding voyage, the vessel carried a full cargo of military supplies, food stuffs, a full cargo, and that there was no damage to any cargo on that voyage.

Mr. Howard: I object to that offer of proof.

The Court: The objection is sustained.

“Q. Where did you proceed from Rio after that?” [116]

Mr. Howard: I object to that question. It still relates to the preceding voyage. My objection extends through the top of page 6, counsel, down through the sixth line.

(Deposition of Howard Francis Lane.)

Mr. Wakefield: If the Court please, this immediate question here, "Where did you proceed from Rio after that"—he answers where the vessel went and what it carried. The answer does not have anything to do with damage. He doesn't speak of damage.

I take it that if we came into this court and failed to offer such proof of prior voyages, or where we had been and what we had done, the Court could draw an inference that we were concealing something. Now we come in and offer to show the whole story and counsel objects to that. I think it is probative value for the Court to consider the history of this ship. Maybe she stranded on a voyage, maybe she encountered some difficulties which would enlighten the Court as to whether there was a probability of difficulty on the current voyage, and that is what that question is offered for. I submit that this question is not objectionable, nothing being said about damage.

Mr. Howard: My objection particularly extends, if the Court please, to the question following that, on the last line of page 5, but I believe the objection also [117] has the same merits as far as the preliminary questions which counsel has just read.

The Court: My thinking on this question is along this line: The vessel might have been ever so staunch, strong and tight on the voyage which immediately preceded arrival at the port where she took on the cargo in question, but within a mile of

(Deposition of Howard Francis Lane.)

such port arrival she might have run on rocks and sprung some leaks. Anything like that is in the realm of possibility, and it seems to me it is not proof. It is a question of what was her condition at the time of her loading this cargo and thereafter.

Mr. Wakefield: We will show in this deposition that she didn't run on any rocks at any time. We are covering more than the current voyage, because of giving the Court the opportunity to see the entire picture.

The Court: The objection is sustained.

Mr. Wakefield: I offer to prove by this witness that after discharging the cargo at Rio which came from Naples, the vessel then went to Buenos Aires, loaded wool and hides; went to Montevideo, loaded more wool; then to Santos and loaded coffee; then to Rio and loaded more coffee; stopped at Trinidad for fuel oil; then proceeded to the United States, North Atlantic ports including Boston and New York; and that during the course [118] of this northbound voyage there was no evidence of leakage in the vessel, no damage to any cargo.

Mr. Howard: I object to that offer of proof on the grounds heretofore stated.

The Court: Sustained. Counsel again on this point are invited to during the noon hour assemble any authorities which will support their respective positions and call them to the Court's attention.

"Q. After you discharged your northbound

(Deposition of Howard Francis Lane.)

cargo, captain, what if anything was then done to the Sweepstakes?

A. Due to the tween decks at the time being obstructed with padeyes, cleats, chain lashings with turnbuckles attached, and cribbing for carrying fuses for bombs, these were all removed at the conclusion of that voyage. The vessel was outfitted with new tarpaulins and all the war equipment was removed from the ship. There was a conversion from the original wartime category back to its peace time pursuits.

Q. To the best of your recollection when were these repairs and alterations completed?

A. Roughly December of 1945.

Q. Was there a voyage between December, 1945, captain, and the voyage in question?

A. No. [119]

Q. Now, you mentioned new tarpaulins, captain. How many tarpaulins were supplied for each hatch?

A. The law requires three for each hatch and there were three for each hatch.

Q. Was any damage to the northbound cargo called to your attention, captain, on the previous voyage?"

Mr. Howard: I object to that question and the following question on page 7 for the same reason heretofore stated relating to previous voyages.

Mr. Wakefield: The offer, Your Honor, is merely to prove by this witness that there was no damage to cargo by leakage or water on this northbound voyage and that the cargo was discharged.

(Deposition of Howard Francis Lane.)

Mr. Howard: The objection heretofore stated applies to these questions.

The Court: Sustained.

“Q. At the time of the repairs to remove from the vessel the cleats and other war gear that you spoke of, did you at that time make an inspection of the ship?

A. At the time it was necessary because I was the one that fought to have it removed because with the coffee trade, with all these obstructions in the holds, it caused damage to the coffee bags.

Q. Did you make an inspection after the completion of [120] the repairs?

A. Yes. That was taken care of with the port engineer.

Q. Did you at that time form any opinion of the condition of the vessel for carrying cargo?

A. The vessel was put back in practically the original condition she was in before and that was for the carriage of general cargo, all except the deep tanks which were never completed.

Q. Do you recall, captain, when you commenced to load cargo at New York on the next southbound voyage?

A. In February of 1946.

Q. Do you recall without referring to your log book the exact date when you commenced to load?

A. I can't remember back that far, no, sir.

Q. I show you a document, captain, which is called “deck log book, SS Sweepstakes, commencing January 28, 1946, ending May 25, 1946,” and ask

(Deposition of Howard Francis Lane.)

you if you will describe what this book is (handing to witness)?

A. That is the rough log book of the vessel. It is part of voyage 12. It is not the complete voyage."

Mr. Wakefield: At this time, if the Court please, I merely exhibit to the Court this log book, which I will not at this time request to be marked unless the deposition requires it and counsel wants it. The point is, I [121] do not think it is material.

The Court: Let counsel see the part of the log book which you expect to call to the Court's attention.

Mr. Wakefield: I do not think I expect to call it to the Court's attention, Your Honor.

Mr. Howard: I am willing to proceed, Your Honor, and examine the log book during the noon hour, if necessary.

"Q. That covers the southbound voyage?

A. That covers the southbound and northbound but it does not cover a complete voyage.

Q. How is that log prepared?

A. That is a copy. This is the smooth log book here, I have to make that correction. The rough log book is on the ship. This is a copy of the rough log.

Q. Yes. Is it a general practice in your business to keep both a smooth and a rough log?

A. It is necessary and required.

Q. Now, captain, are the original entries from which the smooth log book is prepared made by the officers on watch?

A. Yes, sir.

(Deposition of Howard Francis Lane.)

Q. And from time to time are these entries typed into the smooth log by the chief officer?

A. The smooth log is kept by the ship's purser and it [122] is a copy of the rough log.

Q. Does your signature appear on these pages of this log book, captain?

A. The smooth log is signed by my signature, yes, sir.

Q. Now, referring to this log book, captain, can you refresh your recollection as to when the vessel commenced to load the southbound cargo?

A. Yes (examining book). This log does not start with the commencement. I guess the first day of this is the 28th of January.

Q. Some time prior to that loading started?

A. The first page, it says there were gangs of stevedores loading already.

Mr. Lord: I would like to have this marked Respondent's Exhibit A for identification, subject to the designation being changed in the event other depositions have been taken and exhibits offered by the respondent.

(Log book marked for identification Respondent's Exhibit A, 10/6/48, HH.)"

Mr. Wakefield: Your Honor, perhaps I had better have this marked for identification at this time.

The Court: Is that the same one you mentioned a moment ago? [123]

Mr. Wakefield: Yes, Your Honor.

(Deposition of Howard Francis Lane.)

The Court: Let it be marked Respondent's Exhibit A-1, unless you suggest something that is more appropriate as an identification number.

(Log book marked Respondent's Exhibit A-1 for Identification.)

"By Mr. Lord:

Q. Now, prior to the loading of the cargo at New York did you, captain, yourself inspect the cargo holds?

A. I did not inspect the cargo holds. The chief officer and the chief engineer inspected the cargo holds prior to loading.

Q. Did you inspect the holds to determine what if any dunnage was used prior to the time that the cargo actually came aboard?

A. All I could see was what I could see from the deck. The chief officer was in entire charge of the cargo. He inspected it.

Q. Could you see from the deck the dunnage that was laid in the upper and lower tween decks?

A. You could see that the dunnage was laid from the lower hold and lower tween decks.

Q. Do you remember, captain, what the dunnage consisted of on the floors of the upper tween decks?

A. I recollect this shipment that is in question because [124] of its being a priority cargo, being flour, three layers of dunnage was utilized plus paper to protect the bagging.

Q. You mentioned the term "priority cargo." Will you explain that for us?

(Deposition of Howard Francis Lane.)

A. Due to the shortage of flour in South America this cargo was loaded last, was loaded in the square of the hatches for immediate discharge.

Q. So that as far as possible you gave this particular cargo preferred stowage?

A. This particular cargo was given preferred stowage, otherwise it wouldn't be in the square of the hatch for immediate discharge.

Q. Now, you mentioned three thicknesses of dunnage. Was that criss-cross dunnage?

A. The usual practice is that the lower layer is laid fore and aft with drainage toward the scuppers; the second layer was thwartships, and the top layer fore and aft again."

* * *

"Q. And in this instance you observed the dunnage to be so? [125]

A. Yes, because I personally put in for the cargo paper to protect the cargo bags; I personally made the complaint to the stevedore to have cargo paper, and the cargo paper was laid to protect the bags.

Q. Where was that paper laid?

A. It was laid on top of the third layer of dunnage.

Q. Did you have cargo paper elsewhere in the tween decks?

A. Wherever the flour was stowed against the battens of the tween decks, as it was in No. 1, cargo paper was put against the cargo battens to protect the bags.

(Deposition of Howard Francis Lane.)

Q. Did you have any exposed stringers or longitudinals in any compartment?

A. Cargo battens covered all the longitudinals and stringers. The only defect in the cargo battens was the steel bolts that came through which would cause damage to a cargo of flour.

Q. Is that the reason they were covered?

A. That is the reason paper was utilized and dunnage where necessary.

Q. Were there any other metal surfaces that were exposed to cargo in stow?

A. Not in that type of vessel, no, sir.

Q. Captain, were you on board the Sweepstakes during the period of loading in New York? [126]

The Witness: Not every day, no, sir.

By Mr. Lord:

Q. Captain, during the loading of the vessel did you inspect any of the cargo that came aboard yourself? A. No, sir.

Q. You then know nothing of your own knowledge as to its condition.

A. I know nothing of its condition outside of what the chief officer signed, and the tally clerks and the surveyors on the pier noted, and that is given to us as exceptions, and the exceptions are made on the bills of lading.

Q. Such exceptions relate to the external condition of the cargo? A. Yes, sir.

Q. To your knowledge were any inspections

(Deposition of Howard Francis Lane.)

made which would necessitate the opening of bags of flour?

* * *

The Witness: No, sir.

By Mr. Lord:

Q. Do you keep records, captain, as to where the cargo [127] is stowed on your vessel?

A. Yes. The cargo plan denotes all the stowage of cargo.

Q. I show you a document or a large sheet of paper and ask you if you will identify this for us? (handing document to witness)

A. This is the cargo plan of the SS Sweepstakes, voyage 12.

Q. Voyage 12 is the one that you described as leaving New York in February, 1946, is that correct?

A. That is correct.

Q. Do you recall of your own knowledge, without consulting the cargo plan, where the Rio flour was stowed?

A. No. 1 tween decks, No. 2 tween decks, No. 3 tween decks, No. 4 upper tween deck and lower tween deck. That is roughly.

Q. Would this plan, Captain, show the stowage of the Rio cargo?

A. Yes, sir. It would show the stowage of all the cargo for all the ports.

Q. Is this plan prepared in the usual course of business of the vessel as a common carrier?

A. That is the typical plan and the usual plan we use.

(Deposition of Howard Francis Lane.)

Mr. Lord: I offer this as Respondent's Exhibit B for identification.

(Cargo plan was marked for identification Respondent's Exhibit B, 10/6/48, HH.)"

Mr. Wakefield: I ask that this cargo plan be marked for identification as Respondent's Exhibit A-2. It bears the identification of Respondent's Exhibit B, 10/6/48, HH, in connection with the deposition.

(Cargo plan marked Respondent's Exhibit A-2 for Identification.)

"By Mr. Lord:

Q. Captain, will you kindly consult the log book and look at the entries which appear in it, covering so much of the period of loading as is in that log book, and tell us whether or not there is any reference in the log to rain?"

Mr. Howard: Counsel, I would suggest that the log book be offered in evidence before the witness is allowed to testify from it. I have no objection to admitting the log book.

Mr. Wakefield: Counsel has asked that the log book be put in evidence, so I now offer Respondent's Exhibit A-1.

Mr. Howard: No objection.

The Court: Admitted.

(Respondent's Exhibit A-1 received in evidence.)

The Court: Did counsel for libelant see the (Deposition of Howard Francis Lane.) cargo [129] plan, marked as Respondent's Exhibit A-2?

Mr. Howard: Yes, Your Honor, I have had an opportunity to examine it.

The Court: When, if at all, do you wish to offer that?

Mr. Wakefield: I will offer it at this time.

Mr. Howard: No objection.

The Court: Admitted.

(Respondent's Exhibit A-2 received in evidence.)

"A. January 30th it rained but that was after loading hours (consulting book). That is all I can see here.

Q. At what pier was the Sweepstakes during loading? A. Pier 32, North River.

Q. Is it customary, captain, to load dry cargo during rain?

A. It depends on the type of cargo. Heavy machine case goods, we load in light rain.

Q. Do you recall, captain, of your own knowledge whether there was any rain while you were aboard the Sweepstakes during the period of loading? A. That I don't remember.

Q. While loading such machinery as you described during the light rain, captain, is it the practice to rig up any protection for the hatches during that period? [130]

(Deposition of Howard Francis Lane.)

A. They have the hatch tents which they use for coverage and protection of open hatches, and the slings as they come aboard, the pallets, have a canvas top over the cargo as it leaves the pier for the ship. That is the practice in most steamship companies.

Q. Where are the scuppers located in the tween decks?

A. In the aft end of the tween decks of the forward hatches, and the forward end of the tween decks in the aft hatches.

Q. You what are ordinarily described as bilges on these vessels, is that right?

A. They have no bilges. They are wells.

Q. Are these longitudinal?

A. They are thwartships.

Q. How deep are these wells, captain?

A. Roughly the depth of the double bottom tanks. Let us say a well is 40 inches deep—not quite that depth because there is concrete in the bottom.

Q. Captain, do you remember what kind of a voyage you experienced after you left New York until the time you arrived at Rio?

A. A typical South American voyage such as I have experienced for the last eight years: Quiet, moderate breeze, moderate seas. The only damage that could ever occur would be from rain squalls.”

Mr. Howard: I move to strike the last sentence of the answer as not being responsive to the ques-

(Deposition of Howard Francis Lane.)

tion, which asked him the kind of voyage experienced from New York to Rio de Janeiro.

The Court: I understand that to refer to the weather. What do you understand to be the nature of the information sought by the inquiry?

Mr. Howard: I understand him to be referring to whether any damage could have been sustained to cargo carried abroad, or any damage to the vessel which would result in damage to the cargo aboard.

The Court: Anything relating to the voyage which would have any possible materiality in an inquiry as to damage to cargo, isn't that the subject matter of the inquiry?

Mr. Howard: On that basis, Your Honor, I withdraw my objection.

The Court: We will take the noon recess. Court will be recessed until 1:30. Counsel are excused until 2 o'clock.

(At 12:03 o'clock p.m., Tuesday, November 1, 1949, proceedings recessed until 2 o'clock p.m., Tuesday, November 1, 1949.) [132]

November 1, 1949

The Court: You may proceed in the case on trial.

Mr. Wakefield: We will resume the reading of the deposition of Captain Lane.

DEPOSITION OF HOWARD LANE

Direct Examination

(Continued)

“Q. At the time you completed loading cargo in New York what was done with respect to the hatches?

A. The hatches were battened down, the tarpaulins put in place, and strongbacks put across the tarpaulins. All cargo gear booms lowered; blowers put in operation for the ventilation of cargo.

Q. Did you stop at any ports on your voyage to Rio?

A. We stopped at Trinidad for fuel bunkers and also to discharge mail.

Q. Do you remember the date of that, captain?

A. Not offhand. I would have to revert back to the log book.

Q. Will you do so, please?

A. Yes (consulting book). Arrived the 9th of February at Trinidad.

Q. Was that after you took bunkers? [133]

A. No, that is prior. We arrived on the 9th of February. Then the vessel discharged mail, and took bunkers.

Q. Will you be good enough to refer to the entries in the log book for the 8th of February, captain?

A. Yes, sir.

Q. Are there any entries on that page about taking bunkers on the 8th of February?

A. No, the vessel is at sea on the 8th of Feb-

(Deposition of Howard Lane.)

ruary. The 9th the vessel arrived, bunkers was started; oil barge began pumping alongside 1125 on the night of February 9th.

Q. You arrived at anchorage, did you not, on the 8th of February?

A. No. The vessel arrived the 9th of February.

Q. All right. What hatches were opened to discharge mail, do you remember?

A. That I do not remember, no, sir.

Q. Does the log book indicate what kind of weather you had while in Trinidad on the 9th of February?

A. Yes, sir. The log book indicates wheather mostly cloudy, moderate easy breeze, moderate sea and swell.

Q. Is there any entry there relating to rain?

A. Rain, yes, sir. Frequent light rain falls during the 12 to 4 watch in the morning. I can make a statement, No. 5 hatch discharged 441 bags of mail; No. 5 hatch was opened in Trinidad. [134]

Q. You then sailed to Rio, captain?

A. We left the 9th of February at 2356 and sailed for Rio de Janeiro, yes, sir.

Q. On what date did you arrive?

A. (Consulting book). The 19th of February.

Q. Do you remember when cargo was discharged? A. The 21st of February.

Q. That was when the discharge was commenced? A. That is true, yes, sir.

Q. And when was that concluded?

(Deposition of Howard Lane.)

A. 1010 on the 25th of February.

Q. Are there any entries in the log book about rain during that period, captain?

A. 22nd of February it says all hatches being covered due to rain.

Q. Without quoting into the record, captain, all the entries that may be in the log book about rain, will you tell us what the general practice was in connection with covering the hatches?

* * *

By Mr. Lord:

Q. What was the general practice, captain?

A. The general practice, in heavy rain it is necessary to cover the hatches where we have perishable cargo underneath, and all officers understand that and that was the [135] practice.

Mr. Prem: I understand that what was actually done on that occasion you have no knowledge at this time.

The Witness: You mean on this occasion when it rained that evening?

Mr. Prem: Yes.

The Witness: That I could not state, no, sir.

Q. (By Mr. Lord): Upon reading the entries in the log book would your memory be refreshed as to what occurred during the Rio discharge?

A. Yes, sir. It will be necessary to read the log book to remember what happened over two years ago.

Q. And in so doing would your memory be re-

(Deposition of Howard Lane.)

freshed so that you could testify as of your own knowledge? A. It will be necessary, yes, sir.

Q. When the Rio flour was discharged at what berth were you, do you recall?

A. It was in Berth 2. That is the deep water berth for perishable cargo.

Q. Were those bags discharged on to a pier or on to lighters?

A. No, being a priority cargo it was passed through customs and loaded on flat cars. Customs tallied the cargo as it went into the open flat cars. That I observed myself. [136]

Q. Will you describe these flat cars for us, captain?

A. An open flat car about 30 feet long, about four to five feet high, as used in the docks at Rio de Janeiro.

Q. Are those what you would call closed or open cars?

A. An open car similar to the American type of flat railroad car, only much shorter.

Q. Did you have occasion to observe the discharge of these bags of flour, captain?

A. I was not present at all times, no, sir. I was there when Mr. Caswell and the chief officer inspected No. 3 hatch. I left them at No. 3 hatch and they inspected the remainder of the hatches. That is Mr. Caswell's practice when Moore-McCormack ships arrive at Rio de Janeiro."

Mr. Howard: I move to strike that last part of

(Deposition of Howard Lane.)

the answer, since it appears the witness had no personal knowledge and therefore is in no position to state what other men may have done on that occasion.

The Court: Is it not developed on cross-examination or elsewhere?

Mr. Wakefield: Mr. Caswell is a witness and so is the chief mate, and they testified they inspected them, so I don't think it makes much difference.

The Court: It is stricken. [137]

“Q. What was the purpose of that inspection, do you know?

A. Mainly for pilferage, for finding if any pilferage existed which could be noted, and for sweat damage.

Q. If damage is found, is it customary to make reports?

A. The report is made immediately. Surveyors are called in immediately if the damage is excessive.

Q. In the ordinary practice of your business would that report be called to your attention?

A. That I would know about, yes, sir.

Q. Was any such report called to your attention in Rio?

A. I know of no report about sweat damage. I know of pilferage of cargo, not sweat damage.

Q. Do you know of any report about any other type of damage, water damage, being called to your attention?

(Deposition of Howard Lane.)

A. I know of no report of water damage.

Q. What are these reports called?

A. Mate's report of damaged cargo.

Q. And if such a report is prepared are you required in the general course of your business to sign these reports?

A. That is necessary before we forward them back to the claim department and the operating department in New York. That is to keep us informed of what cargo was damaged.

Q. And these reports cover all of the cargo that is observed to be damaged upon discharge of the vessel? [138]

A. That is true. They cover what is found on the dock damaged and also what is found aboard ship.

Q. Do you know whether or not there was any representative of the customs or dock administration at the ship's side when this cargo was discharged?

A. There was always a customs officer at the ship's side, but I have no knowledge he is concerned with the cargo of the vessel.

Q. In other words, captain, you take no interest in the cargo after it leaves the ship's tackle?

A. After the cargo leaves the ship our responsibility for its carriage ends.

Q. Do you know who it was that arranged for the flat cars to meet the ship's side?

A. I have no knowledge of shore operations.

(Deposition of Howard Lane.)

Q. Did you observe any damage whatever to any bags of flour discharged at Rio?

A. I know of no damage to any flour discharged at Rio.

Q. When you completed this southbound voyage, captain, did you make a subsequent trip on this vessel?

A. I made one more trip to South America, yes.

Q. I understand there are other ports of discharge than Rio, is that correct?

A. Yes. Buenos Aires, Santos and Montevideo.

Q. At these other discharge ports was any water damage [139] called to your attention?

A. I know of no water damage at the time being called to my attention.

Q. In the subsequent voyage what cargo did you carry then?"

Mr. Howard: I object to this question and the next three questions following on the same grounds as stated this morning; that is, that this now relates to a subsequent voyage and not the voyage in question. I submit that any evidence of cargo or damage if any that may have been sustained to cargo on a subsequent voyage would not be admissible for the same reason that evidence of damage on a prior voyage would not be admissible.

Mr. Wakefield: I think the distinction is self-evident, Your Honor. While it is conceivable on a prior voyage you might not find materiality as to conditions; certainly on the northbound voyage

of this same voyage and the next voyage, if there was no damage or no repairs were made to the ship, it would be very strong evidence that there was no damage on the voyage in question. It is directly related to the issue in this case, the subsequent voyage.

The Court: Does either side have any authorities they wish to submit in connection with the statement of [140] their position?

Mr. Howard: I have, Your Honor.

The Court: Do you have any Federal Court citations?

Mr. Howard: Yes, Your Honor, I have two Circuit Court cases, both admiralty cases.

The general rule is stated in 32 CJS, Evidence, at Sec. 583 as follows: "Thus, in the absence of a showing that the essential conditions were the same, an issue as to the existence or occurrence of a particular fact, condition, or event cannot be proved by evidence as to the existence or occurrence of other facts, conditions, or events, although they may be, in some respects, similar."

The first case I have is an admiralty case from the Fourth Circuit Court of Appeals, *The Richelieu* 1931 AMC 721, 48 F. (2d) 497. The court was concerned with an action involving an explosion and fire aboard a ship. The respondent shipowner sought to show it had loaded other products in previous years under the same conditions without mishap.

The Appellate Court held such evidence was not

admissible, and said in part as follows: "And the fact that no explosion resulted in the loading of coal is not conclusive that the methods employed were such as in the exercise of due care should have been used even there." [141] The court excluded such evidence of loading on previous voyages.

Another Federal case—this is a District Court case, I was mistaken in saying there were two Circuit Court cases—is *The Ensley City*, the District Court of Maryland, 71 F. Supp. 444. This is an action for damage to a cargo of licorice extract. In the trial of the case, the trial court excluded from the evidence records offered by the carrier to show temperatures in the holds on previous voyages to show there was no substantial damage from temperatures recorded in the voyage in question.

In that case, the decision of the court held that substantially similar conditions had not been shown to exist, and that too many other factors might affect the temperature readings; hence such evidence was not admissible.

I submit to Your Honor that those authorities and others non-admiralty in nature which might be quoted also justify the Court in sustaining the objection not only to evidence of conditions on prior voyages, but certainly for the same reason, evidence of conditions existing on subsequent voyages.

Mr. Wakefield: I think Mr. Howard's decisions

are not in point in any sense of the word. Those cases— [142] both of which I am very familiar with, because Your Honor will recall that in the Apex fish case we had the same question—both of those cases involved the issue of proper stowage, and so did the Apex fish case; namely, putting a certain commodity in a certain place in a certain way, and proof was offered to show that it had been done on other occasions in that same way without damage as tending to show that it was proper on the occasion in question.

That isn't what we have before us here at all. We have before us here alleged salt water damage to cargo while on board the ship, upon which the libelant has the burden of proof, and respondent in proving its case comes forward and shows that there was no such contamination on a prior voyage, that there were no conditions on the current voyage to account for it, and that on a subsequent voyage there was no salt water damage, and that the ship had not been repaired during that time.

In other words, this testimony that we offer here is related to the issue because the issue is, was this cargo damaged by salt water. That means leaky rivets or leaky hatch covers or some way that salt water got into this ship, so if we limited our testimony just to the voyage in question, then counsel in argument to Your Honor would say, "He doesn't show anything about the [143] subsequent voyages. Maybe this ship went back to New York and had

to repair her tanks, or maybe she repaired leaks in the deck," and we would be criticized for not showing the evidence I am now trying to show.

There is a vast difference between what counsel has cited, and I will admit, as the Ninth Circuit said in the case involving damage, that you might negligently stow cargo on five voyages and not have any damage, but the sixth time it might be damaged, so that successful carrying on previous voyages of cargo isn't evidence that it was not properly stowed. We don't offer it for that purpose. We are showing a continuous fact. The issue is, was this cargo damaged by salt water on this voyage. The captain has already testified that the voyage was a quiet, normal voyage, that nothing occurred on the voyage to account for any possibility of salt water.

The Court: What would be your position if Mr. Howard was trying to show that you did not make subsequent repairs?

Mr. Wakefield: I think that would be admissible.

This case before us now is what I call a circumstantial evidence case. There isn't any direct evidence on either side. You have an ultimate fact here that so many days after the cargo was discharged it was found [144] to be damaged.

The Court: I am frank to say to you gentlemen that it is surprising to me that it wouldn't occur to counsel to brief this question. Since you were taking this testimony by deposition, you must

have known in advance that this question was going to arise. I do not see how this point could escape your attention as one of the points you would want to brief. What is the use of leaving this question to be settled by an appellate court? If you gentlemen had this question briefed, we could settle it right here.

I tell you frankly that I am in a position to be benefited in my thinking by careful briefing of this point, on this question of whether the making or non-making of subsequent repairs, subsequent to the happening of an accident, may be shown as bearing upon the question of negligence.

Mr. Wakefield: There isn't any contention here that repairs were made.

The Court: What you are doing is offering evidence to show no change in the conditions, is that not right, to show that no change in the condition took place?

Mr. Wakefield: I think that is true.

The Court: You made no repairs and nobody suffered any damage, is that not what you seek to show as evidence [145] of the fact that nobody suffered damage on this case and the ship did not cause this damage?

Mr. Wakefield: That is correct.

I have one case I would like to mention. Of course, you cannot always find a case on all fours, but this is certainly of general application. It is the *Rangoon Maru*, by the Second Circuit, 27 F. (2d) 722.

In that case, there was damage to cargo, which was bleaching powder, and the claim was that that damage resulted from heat aboard the vessel, and libelant was contending that the bleaching powder was stowed in a hot hold. Testimony was admitted as to the character of the hold, by experts, and as to whether or not the stowage was proper.

The Court said, "Each person with practical experience in stowing bleaching powder who was called as a witness testified that the stowage which the Grace shipment received on the Rangoon Maru was not improper. It was passed by the New York Board of Underwriters and seems to have received all the consideration similar shipments usually receive. In other words, the stowage was according to the established custom and usage of trade at this port, and this is enough to rebut a charge of negligence in that regard."

This further statement of the Court I think is in point here: "Cocks, an experienced cargo surveyor called by the claimant, said that the estimated temperatures were exaggerated, and that the temperatures of the forward part of No. 3 and No. 4 'tween-decks would be generally the same. He added that the Rangoon Maru had safely carried in the forward end of No. 3 'tween-decks on her previous voyage dessicated cocoanut, a commodity that is damaged by excessive heat. Peterson also testified that the difference in temperature between No. 3 'tween-decks and No. 1 hold, which is claimed by libelant to have been the coolest part

of the ship, was about four to five degrees, and Dalton's testimony was that it was only five or six degrees. Cocks' estimate was apparently the same as Dalton's."

The Court further said: "A formidable array of witnesses experienced in stowage approved the stowage in question, and even libelant's surveyor Metcalfe made no criticism of the places of stowage. In such circumstances, the usage of the trade, and not the opinion of chemists, however sound, is the test." Citing cases. "The trade evidently thought that moisture, and not heat, was the danger. This was established by an overwhelming weight of evidence.

"In spite of the mass of testimony of skilled men that the stowage was customary and proper, we are asked [147] to declare it bad on inferences at best uncertain as to the temperatures in the ship's compartments, and on conflicting views of the experts as to what degree of heat causes disintegration. This we decline to do."

There was testimony of other voyages and expert opinion as to the character of this cargo space not on the voyage in question but on other voyages as bearing upon the correctness of the stowage on this voyage.

Here we are just showing a continuation of events; the voyage itself, on which there is no showing of salt water damage to any cargo, and then the return voyage, and then the next voyage, and we still have no evidence of leakage or repairs to

the ship to correct any leakage. That has strong probative value in a circumstantial evidence case of this kind.

Frankly, I do not know of any case directly in point. As I say, those of counsel's are not in point, either. My case of the Rangoon Maru is somewhat contrary to the one counsel reads, but rather than have anticipated an objection, it was my view that if I did not come forward with this kind of evidence, then counsel would claim I was covering up something because I wasn't showing what happened to this ship later on. He would be arguing "Maybe when they got back to New York they examined the ship, found this and that wrong and repaired it, therefore that would tend to show there was something wrong on this voyage." That is my only purpose in offering it, to bring before the Court all of the facts which have a direct bearing on the possibility of such damage.

The Court: You say you have no cases indicating that the rule is the same, Mr. Howard, respecting before and after the voyage in question, respecting introduction of evidence of conditions after as well as before, that such evidence is excluded?

Mr. Howard: No, Your Honor. The cases I cited related to the evidence of preceding voyages. I have examined the authorities trying to find such cases, and those were the only ones I could find in point.

The Court: Did you try to find cases concern-

ing the admissibility of evidence of conditions subsequent to the voyage in question?

Mr. Howard: I did on this question, yes.

The Court: Did you anticipate that this was coming up this afternoon?

Mr. Howard: Yes, Your Honor, and for that reason I had briefed this point, and these were the only authorities I could find involving shipments on vessels, that the question had been discussed. I submit to Your Honor that I can see no logical basis for any distinction [149] between subsequent voyages and prior voyages, and in fact, the Corpus Juris citation which I gave Your Honor, 32 CJS, puts them altogether in the same category, I believe.

Mr. Wakefield: Your Honor, let us suppose Mr. Howard by interrogatories of discovery had developed that upon return of this ship to New York, on the occasion of returning from this voyage, that the ship had been put into dry dock and they had to repair 10 or 12 leaky rivets or had to make some hull repairs. He would be offering that evidence as bearing upon the probability of the ship having leaks on the occasion of this voyage when the cargo was supposed to have been damaged, and I think it would be admissible, and by the same token, our showing that there were no such leaks or no repairs, no damage to other cargo on the subsequent voyage, is of the same probative value that that testimony would be.

I think this is somewhat similar to limitation of

liability cases where you have to prove all of the surrounding circumstances to show lack of knowledge, surveys of the vessel and conditions over a long period of time.

The Court: I suspect that if CJS said anything about admissibility of prior conditions, it will say something about admissibility of evidence of subsequent [150] conditions.

Mr. Howard: I couldn't recall anything on that, Your Honor.

The Court: Will you take CJS and see if you find any statement about subsequent conditions, Mr. Howard?

Mr. Howard: There is one section that has some slight bearing on it, I believe.

Sec. 585, "Continuing facts. The existence of a fact at a particular time may, under some circumstances, be shown by evidence of its existence at another time.

"Since there is a presumption, as shown supra § 124, of the continued existence of a fact or condition of a continuous nature, it follows that such a fact may, within the limits of relevancy, be shown to have existed at a particular time by proof of its existence at a prior time, and its existence at a subsequent time may be shown where the interval is short as compared with the natural permanent nature of the fact or condition in question. Likewise, the existence, at a particular time, of a fact or condition of a temporary nature may be proved by evidence of their existence at another time, pro-

vided it is shown that they did not change during the interval; but, in the absence of such a showing, the evidence is inadmissible.”

The Court: In that connection, is it your contention [151] that before any of this could be shown, either prior or subsequent conditions, that the detailed proof as to the similarity of conditions must first be established?

Mr. Howard: Yes, Your Honor. I think that is essential in the first place, and that was pointed out in this case that I cited to Your Honor, the District Court case. The Court held that substantially similar conditions had not been shown to exist, and that there were too many other factors that might affect the temperature readings.

I think the same could be applied equally as well on a subsequent voyage; there are too many other factors that might affect it, the weather encountered, the type of cargo, the nature of the voyage involved, the ports of call, and things of that nature. Certainly there is no similarity of conditions which, as indicated in this CJS citation and in this case, are necessary before any such evidence could be admitted.

Mr. Wakefield: Of course, I think the CJS statement Mr. Howard just read supports this testimony, because we are now talking about the return trip from South America back to——

Mr. Howard: I beg your pardon, counsel. My objection was not placed until your testimony finished the return voyage, until you started on the next voyage [152] southbound.

Mr. Wakefield: I hadn't gotten that far.

The Court: I understood that you had. "In the subsequent voyage what cargo did you carry then?" He commenced to object then. "General cargo, mainly machinery, tin plate. We also had flour for Santos," was the answer.

Mr. Howard: That was my understanding of the question and answer, it referred to the next subsequent voyage after the vessel returned to New York. The questions immediately preceding talked about cargo northbound from South America to New York, and I made no objection to that.

Mr. Wakefield: The question following says, "Did you load any cargo northbound after you completed discharge on the southbound voyage?" That is the one I am talking about.

The Court: The question preceding that is a subsequent voyage, and that must mean the northbound voyage, must it not?

Mr. Wakefield: That is what I took it to mean.

The Court: The question you are now speaking of is expressly so stated, and Mr. Howard objects to both questions, as I understand it, and did not object to any prior to the one on the subsequent voyage. Unless [153] you show me some authorities that authorize it, I am going to have to sustain the objection.

Mr. Wakefield: Even as to the northbound voyage?

The Court: Yes. I do not see any authorization for it in anything you have cited. I ask counsel to

give me the benefit of the authorities in the matter.

The objection is sustained.

Mr. Wakefield: In view of the Court's ruling, the respondent officers to prove by this witness that on the northbound voyage immediately following the discharge of the flour at Rio de Janeiro the ship called at Buenos Aires and Montevideo and loaded cargo consisting of hides and wool and casein, and coffee at Santos and Rio, and that this cargo was carried to New York where it was discharged, and that there was no damage to any cargo by reason of water or salt water on this immediately following northbound voyage of the vessel.

The Court: What is your attitude, Mr. Howard?

Mr. Howard: I would like to get counsel's offer of proof clear in my mind. As I understand, his offer of proof refers to the northbound voyage, the northbound leg of the voyage immediately after the voyage in which we have claimed damage to the shipment of flour.

Mr. Wakefield: That is correct.

Mr. Howard: I object to that in that it relates [154] to the subsequent voyage and not the voyage in question, for the same reasons heretofore stated.

The Court: Sustained. If counsel before the end of the trial can produce authorities indicating the Court's ruling is wrong, I will be glad to reconsider it.

DEPOSITION OF HOWARD LANE

Direct Examination

(Continued)

“ * * *

Q. Captain, have you recently looked through the bilge soundings shown in the deck log book for this voyage? A. Yes, sir.

Q. Can you describe what if anything they show?

A. Well, the normal bilge sounding for that type of vessel, very little change. The average would be about three, four inches for the soundings of the four holds.

Q. Are the sounding methods in all holds uniform, captain?

A. No. In No. 2 lower hold, being a deep tank, that was difficult.

Q. Why is that?

A. Due to the turns in the bilge sounding line as it was originally constructed to be an oil carrying deep tank and the lines were brought over close to the bulkhead so that they could be tapped off when oil was carried.

Q. What effect does that have on the bilge soundings?

A. It is difficult to get a sounding rod down there to [155] get a real accurate sounding of the bilge. When you draw up a sounding rod through a curved pipe it smears the water or whatever is in the well, all over the sounding line rod.

Q. Did you have any overflows in your bilge during this voyage?

(Deposition of Howard Lane.)

A. No. We had no overflows.

Q. Did you describe the voyage as rather a light one, captain. Did you take much water aboard?

A. Well, the ship was never loaded to capacity. All we would have is the spray, what you would normally get when bucking the trade winds from Trinidad up to Rio City.

Q. She was over her marks then?

A. No. She was under her marks. She had at least two feet free board with that amount of cargo.

Q. I should have said she was above her marks.

A. That is right.

Q. Will you say, captain, based on your own experience as a chief officer and master of ocean going vessels that the Sweepstakes was in all respects seaworthy and properly manned during this particular voyage?

Mr. Prem: I object to the question as leading."

Mr. Howard: I object to the question on the ground it is leading, and on the further ground that it calls for the opinion of the witness, which I believe is within [156] the province of the trier of the fact, as to whether or not the vessel was seaworthy and properly manned, on the basis of testimony as to those points which may be produced.

Mr. Wakefield: That is what we have been testifying to, if the Court please, as much as possible, all about the ship, her bilges, freeboard, the character of her hatches, new tarpaulins, all of the reconditioning of the ship immediately before this

(Deposition of Howard Lane.)

voyage, and the captain has testified to all that. Now he is asked his opinion based upon his testimony.

The Court: I am going to overrule the objection. It is so ordered.

“The Witness: Yes, sir, it was.

Cross-Examination

By Mr. Prem:

Q. Captain, do you have the practice on your ship when taking on cargo at New York to issue mate's receipts to the captains of lighters when they would bring their cargo to ship side?

A. No, sir. That wasn't taken care of on the ship, Mr. Prem.

Q. Do you know what receipts if any were given to the lighter captains? [157]

A. That is taken care of by the shore personnel.

Q. Do you as the chief officer know whether any other officer aboard the Sweepstakes gave any receipts to the lighter captains? A. No, sir.

Q. Did they give receipts to anyone else?

A. When cargo is received aboard the ship that they know of and it is labeled special cargo, receipts are given out.

Q. Were any mate's receipts issued on this voyage in question for the cargo of flour shipped by International Milling Company bearing marks CLS, Rio? A. No, sir.

Q. Have you any knowledge concerning the issuance of dock receipts such as I now show you?

(Deposition of Howard Lane.)

A. Yes, but that is the practice of Moore-McCormack. This cargo may have been on the dock for three days or a week before the ship got in there and they issued these receipts out to the people—the trucks, lighters or whoever the cargo was laid on the dock. Once the cargo is put aboard the ship it is carried on the ship, and these are tally receipts which are given to the chief officer for checking the manifest, and also checking against his cargo plan the stowage of this cargo and its marks.

Q. If any bags of flour were received on board your [158] ship water stained or caked what would be your procedure with relation to accepting them or rejecting them, and if accepting them what notation would you make and where?

A. Exceptions are made to the Claims Department through these mate's reports on damaged cargo which are sent out daily of cargo received in a damaged condition and exceptions noted.

Q. Would the ship keep any copies of those reports?

A. Those reports would be on the vessel, yes, sir.

Q. Do you have any personal knowledge at this time whether or not any such cargo was received on board the ship?

A. Of the total cargo?

Q. Yes, of the flour cargo?

A. Of the flour cargo I have no knowledge of that, no, sir.

Mr. Prem: I make demand for the production of all records in the custody of Moore-McCormack that

(Deposition of Howard Lane.)

deal with the condition of this libellant's shipments of flour on the SS. Sweepstakes."

Mr. Howard: Those were produced at my request on receipt of the deposition by Mr. Wakefield, what documents he claimed to have in his file at that time. "By Mr. Prem: [159]

Q. You have no personal knowledge, captain, of libellant's shipments of flour being received on board your vessel, I take it? A. No, sir.

Q. And so far as you are personally aware no sea water entered any of the stowage compartments where libellant's cargo was stowed on this voyage of the Sweepstakes commencing at New York in January of 1946 to Rio? A. No, sir.

Q. What open ventilators or pipes or other avenues of ingress of water were there in those cargo compartments where libellant's cargo was stowed, and I think they were stowed in 1, 2 and 3 upper tween decks and in No. 4 upper and lower tween decks?

A. That is correct, yes, sir. No. 1 tween decks had no water line, and the ventilating system was a blower system which took the air in through the king post and discharged it through another king post in the after end of the hatch. The king posts were so designed and constructed that rain water or spray could not be drawn in.

Q. That is true of Nos. 1, 2 and 3 tween decks?

A. The No. 4 tween deck—I couldn't personally state about pipe lines in No. 4 tween decks, upper

(Deposition of Howard Lane.)

and lower, but 1, 2 and 3 I know are clear of pipe lines. That was due to the wartime construction when we had an armed guard berthed [160] on the vessel, pipe lines were added which were not removed on that previous conversion but we had no use for the fresh water lines as installed.

Q. Captain, did you personally inspect the hatch covers after they were fitted to see if they were tight?

A. The chief officer inspected it. The Board of Underwriters in New York inspected it and the chief officer was there.

Q. But you made no personal inspection?

A. No, sir.

Q. I believe you testified that on the voyage in question there was no heavy weather encountered to Rio?

A. There was no heavy weather, no, sir.

Q. You took no water on deck other than the usual spray from the trade winds?

A. That is all that is mentioned, that is all I remember, yes, sir.

Q. And I take it that you are of the opinion that there was no possibility of sea water having gotten into that cargo hold up to the time you reached Rio?

A. I am of that opinion, yes, sir.

Q. There was no evidence on board of the ship that as a result of your personal inspection would lead you to believe that water did get in?

A. No, sir, not the stowage as I know the cargo was [161] stowed.

(Deposition of Howard Lane.)

Q. I take it that you were not present at all times at Rio while libellant's cargo of flour was being removed from the hatches?

A. That is true.

Q. So you could not of your own personal knowledge testify as to whether there was any stained or caked cargo? A. That is true, yes, sir.

Q. Are you familiar with the practice in Rio of delivering direct to the consignees and not to the custom house?

A. Yes, sir, due to the shortage of flour. At the time it was a priority cargo and the next voyage we had far more flour and we went through.

Q. So you delivered the cargo directly to the consignees

A. It was taken directly to the customers without customs' weighing and inspection.

Q. So that as to this cargo there would be no record of damage in the event there was damage to the cargo because they had not inspected it?

A. I have no knowledge of what they actually do on the pier.

Q. The general rule is under normal discharge conditions for all cargo including flour to go through the customs?

A. That is the normal procedure. [162]

Q. But during the period of the voyage in question I understand your testimony to be that the flour was discharged directly into wagons and did not go through custom's inspection?

(Deposition of Howard Lane.)

A. It was discharged directly into wagons, yes, sir.

Q. You are not prepared to testify to what customs did or did not do with respect to the cargo that went directly into the wagons?

A. No, sir. I have no knowledge of their workings on the piers. I know about this priority due to the fact that Mr. Caswell was in attendance and mentioned it was priority cargo and was taken out directly to the consignee to be sold. This is also true in ports with meats and where the food is short.

Q. Where were those wagons located with reference to the ship?

A. Alongside the ship side, approximately 40 feet away from the ship side. The cargo is removed from the ship's cargo holds by the ship's cargo gear. It was landed on the ships' deck. Then the cargo is picked up by a shore crane and swung over and landed either on the dock or into these cars alongside the pier.

Q. What are the possibilities of sea water coming in contact with the flour that is in the process of being removed from the ship's holds into these wagons? [163]

A. None with that kind of loading there unless the flour was loaded into barges.

Q. No. I am referring now to the cargo concerned in this case which was all loaded into wagons.

(Deposition of Howard Lane.)

A. There would be none.

Q. So in your opinion there would be no possibility of water contact with this flour after it left the ship's holds? A. That is correct.

Mr. Prem: I demand the production of the smooth log for the loading period in New York immediately preceding the period covered by the log which has been produced here today.

I also demand production of the rough log covering the loading period at New York as well as the ensuing voyage to Rio. That is all."

Mr. Wakefield: The log which is Respondent's Exhibit A-1 commences as of January 28, 1946, I think, and covers the balance of the voyage. This log, which has been marked Respondent's Exhibit D for Identification in connection with the deposition, is for the period preceding the other one, commencing October 26, 1945, and ending January 27, 1946. I will ask that it be marked Respondent's Exhibit A-3. [164]

(Log book marked Respondent's Exhibit A-3 for Identification.)

The Court: Is there any particular page of interest here?

Mr. Wakefield: No. The demand was made by the libelant for its production, Your Honor.

Mr. Howard: The period we were interested in, Your Honor, was immediately prior to January 28, 1946. I have no objection to that being admitted in

evidence if it is offered by respondent. We have the other portions of the log in and I submit it is entirely proper this be in. Although there is only some slight reference to it in the testimony, I have no objection to its admission. It does cover the period of loading at New York prior to the commencement of the other log already in evidence.

The Court: Do you wish to offer it?

Mr. Wakefield: Yes, I will offer it, Your Honor.

The Court: Respondent's Exhibit A-3 is admitted.

(Respondent's Exhibit A-3 received in evidence.)

The Court: What kind of log is it?

Mr. Howard: Deck log book.

The Court: Is it the rough log or the deck smooth log?

Mr. Howard: The smooth log, Your Honor. [165]

Mr. Wakefield: I think that I should state for the record that these log books, Exhibits A-1 and A-3, were both delivered to Mr. Howard many months ago for an examination. He has had possession of them.

Mr. Howard: Yes, I had an opportunity to examine them, Your Honor.

DEPOSITION OF HOWARD LANE

"Redirect Examination

By Mr. Lord:

Q. Captain, at Rio was any report made to you of any flour bags being stained or caked?

(Deposition of Howard Lane.)

A. I have no knowledge of any report being given.

Q. You are speaking now of the discharge after this voyage? A. That is right.

Q. No such report was given to you?

A. No, sir.

* * *

Mr. Wakefield: I offer the deposition of Captain Lane in evidence as read.

The next witness I would like to call on behalf of the respondent is Chief Officer Anthony Parsons.

The Court: This deposition of Captain Lane is received as a part of respondent's case in chief.

Mr. Wakefield: Can you indicate where you read?

Mr. Howard: I read all of page 37. I did not read page 38.

Mr. Wakefield: This is the deposition of the chief officer of the vessel, and counsel put in in his case page 37 of the deposition. I will commence at the [168] top of page 38.

DEPOSITION OF ANTHONY PARSONS

Direct Examination

“Q. Do you know when the Sweepstakes commenced to load cargo at pier 32?

A. No, I don't recall. She was loading when I joined her.

Q. I show you a document and ask you if you can describe it for me.

(Deposition of Anthony Parsons.)

A. This is the smooth log of the Sweepstakes.

Q. What is the last date covered in that logbook?

A. January 27th.

Q. And will you turn to the entries for January 27th, chief, and show me whether or not the signature in the lower left hand corner is yours?

A. Yes, that is my signature.

Q. Will you explain why your signature appears in the logbook of the Sweepstakes as early as January 27th?

A. Yes, I am signing it for Mr. Mills, who was the chief officer, I believe, and when he left the smooth log was not prepared yet, so it has to be signed by the chief officer at the time, so I signed it.

Q. And you recognize this as being the smooth logbook of the Sweepstakes?

A. That's right, that is a copy of the rough log.

Q. And is this book kept in the regular course of [169] business of Moore-McCormack Lines, Inc.?

A. That's right.

Q. According to the logbook entries, where was the Sweepstakes on January 27, 1946?

A. Pier 15, Brooklyn—no, she left pier 15, Brooklyn, and shifted to pier 32, North River.

Q. Did she shift on that day?

A. Yes, she shifted that day.

Q. Do the logbook entries for January 27, 1946, make any reference to loading cargo?

A. No, there was no cargo worked on that day.

Q. Now, I show you another document or book,

(Deposition of Anthony Parsons.)

which is marked Respondent's Exhibit A for identification, and ask you if you will identify that for us?

A. That is the smooth logbook for voyage No. 12 of the Sweepstakes.

Q. And on what date does that logbook commence?
A. January 28, 1946.

Q. And does your signature appear on the pages of this logbook?
A. Yes, sir.

Q. And this is the smooth log of the Sweepstakes for the voyage from New York to South American ports previously described?

A. That's right. [170]

Q. And that is a book, is it not, kept in the regular course of the business of respondent?

A. That's right.

Q. Can you tell us, Mr. Parsons, by examining the logbook, when the Sweepstakes commenced to load her southbound cargo?

A. (Referring to logbook) According to the logbook she commenced on January 28, 1946—stevedores were aboard at 8 o'clock and she commenced loading at 8:10 in the morning.

Q. As I understand your previous testimony, you have signed the entries for January 28th, January 29th and January 30th for Mr. Mills, who was the chief mate relieved by you?

A. That's right. That is done quite often, when the book is not ready when the relief arrives the relief signs it for the man he relieved.

Q. Is that because the rough log is kept day by

(Deposition of Anthony Parsons.)

day and the entries in the rough log are at various periods copied into the smooth log?

A. Yes, sometimes it takes several days for the purser or whoever is taking care of the logbook to get it typed up, and possibly the man is relieved before that.”

Mr. Howard: For your information, I read from the [171] next question at the bottom of page 40 through the tenth line on page 43.

* * *

“Q. You mentioned dunnage. Will you describe the dunnage in the compartments where the wheat flour was stowed?

A. Well, the flour is stowed—we used three tiers of dunnage there, in the wings, in the after end and forward and where it is over the metal deck.

Q. Is that what is sometimes called crisscross dunnage?

A. Yes, one tier is crossed over the other.

Q. How was the bottom tier situated?

A. That is loaded so that any water that possibly enters there can lead into the scuppers.

Q. Would that be fore and aft in the tween-decks? A. Yes.

Q. Did you have any other dunnage?

A. Well, when they load flour they use paper over the dunnage to keep it from getting dirty or coming into contact with any dirt, and for sanitary reasons also.

Q. Where was that paper situated?

(Deposition of Anthony Parsons.)

A. They lay paper over the dunnage and they also laid paper over any metal, against any metal, so the bags won't come into contact with metal or wood.

Q. What that done in this instance?

A. Yes, used regular dunnage paper, heavy paper. [172]

Q. Did you observe this paper to be in place in Nos. 1, 2, 3 and 4 upper tweendecks and No. 4 lower tweendecks?

A. Well, when I went aboard they were not loading flour in all those hatches but they did have paper and dunnage where they were loading.

Q. Is it your testimony, chief, that in all compartments where wheat flour was loaded you did have the dunnage you described as well as the cargo paper?

* * *

A. Yes."

Mr. Howard: The testimony from the last line on page 44 through the eleventh line on page 45 was read in libelant's case in chief.

* * *

"Q. Will you check the logbook entries from January 31st throughout the balance of the period of loading and tell us whether or not there was any rain?

A. (Referring to logbook) No, we had no rain from the period I joined the vessel until we left New York.

(Deposition of Anthony Parsons.)

Q. Do you remember, Mr. Parsons, whether the bags of wheat loaded on the Sweepstakes were taken from pier 32 or from lighters, or both?

A. No, I could not rightly say I recall that. I recall [173] seeing some of them coming aboard from the docks, I don't recall that they all came aboard that way, whether some were loaded from lighters or not.

Q. What was the vessel's itinerary after she left New York in her voyage to Rio de Janeiro?

A. Stopped at Port of Spain, Trinidad, to take on fuel and to discharge some mail.

Q. Where was that mail stowed, do you recall?

A. Yes, that was stowed in No. 5 hatch in the square of the hatch, top sowage so it could be discharged readily. That was the only cargo we had for Trinidad, if I recall correctly.

Q. Did you open any of the other hatches?

A. No, no necessity for opening them.

Q. What type of hatch covers did the Sweepstakes have?

A. Steel pontoon covers.

Q. Was it the practice to use any other cover in addition to the pontoon?

A. There was three tarpaulins on top of that to make them watertight.

Q. Did you at any time inspect the tarpaulins?

A. They were inspected when they were put on.

Q. What did you find as a result of such inspections?

A. They were put on properly, no tears in them.

(Deposition of Anthony Parsons.)

Q. Did you make any other stops on your voyage south [174] before reaching Rio?

A. No, not that I recall.

Q. Will you tell us when the Sweepstakes arrived at Rio?

A. I will have to check the logbook for that date. (Referring to lookbook.) Arrived at Rio February 19, 1946.

Q. Was that in anchorage or dock side?

A. No, we anchored.

Q. Did you thereafter proceed to a dock?

A. No, we docked on February 20th.

Q. Do you remember whether you were on watch at the time the hatches were opened at Rio?

A. Well, I was on duty when they opened up the hatches so I could look at them.

Q. Did you make an inspection of the hatches at that time?

A. Yes, I sighted the hatches, looked at the general condition of the cargo.

Q. Did you have any particular objective in mind at the time you sighted these hatches?

A. To see if there was any possibility of condensation, any sweat damage noticeable, any other thing that might have occurred during the voyage. It was a rather smooth voyage, there was no heavy weather damage or anything like that, so the only thing I looked for was any possibility of sweat. I did not observe any. [175]

Q. Was there anything called to your attention

(Deposition of Anthony Parsons.)

during the voyage which would suggest leakage of any character?

A. No, nothing unusual. We had good weather all along, bilge soundings were small and fairly constant.

Q. Now, chief, was it the practice of the company at discharging port to keep a record of damage observed during the course of discharge?

A. The company ashore or on the ship?

Q. I am referring to Moore-McCormack Lines.

A. On the ship we keep a record of all damaged cargo, daily record when we observe any damage.

Q. Was it the practice at Rio to keep a record even on days when no damage was observed?

A. No, at Rio if we did not observe any damage we just didn't bother making out any report.

Q. Do you recall whether or not you prepared any such reports at Rio?

A. Yes, I prepared reports at all ports.

Q. Do you remember whether or not any of those reports mentioned damage to wheat flour?

A. No, I am not sure of that. I don't recall any flour being damaged at all—I recall other cases and stuff.

Q. Do you remember that any report was made to you by anyone of damage to wheat flour during the course of discharge?

A. No, at no time was there any report, any mention [176] made of any damage at all.

(Deposition of Anthony Parsons.)

Q. Was this cargo of wheat flour discharged into lighters on onto the quay?

A. As far as I can recall, the cargo was discharged onto the quay, but I couldn't say definitely if all of it went onto the quay or some went into lighters, but I recall seeing some of it going into flat cars.

Q. Do you remember any flour going into lighters?

A. No, I don't remember seeing any, I don't recall.

Q. You don't know what became of this flour after it left the ship, do you?

A. No, we are usually not interested in that part of it, as long as it leaves the ship in good condition usually our responsibility ends there, we don't follow it any further.

Q. Will you look at the log entries for the entire period of discharge and tell us first when the discharge ended?

A. (Referring to logbook.) Finished discharging February 25, 1946.

Q. Are there any entries in the logbook, chief, about rain for the period commencing February 20th and ending February 25th?

A. Yes, we had some periods of rain during that time.

Q. Do you remember what was done when rain came up during the course of discharge? [177]

A. Well, it is the practice to stop discharging if

(Deposition of Anthony Parsons.)

there is any possibility of the cargo being damaged, especially flour, why, we would stop immediately. According to the logbook I see mention made of the hatches covered due to rain.

Q. In other words, you immediately stop discharge and cover up the hatches?

A. Yes, if we have rain or anything that can get damaged we stop immediately.

Q. When discharging was completed at Rio on February 25th, did you then make an inspection of the compartments out of which this wheat flour had been discharged?

A. Well, I make an inspection all the time, especially near finishing time, primarily to see if there is any overlooked cargo, so we have to inspect all compartments, make sure there is nothing for Rio left in the ship.

Q. Did you on such occasions inspect the Nos. 1, 2, 3 and 4 upper tweendecks and No. 4 lower tweendecks?

A. Yes, inspected all hatches and all compartments where we had Rio cargo.

Q. Did you find any evidence of moisture or water in those compartments?

A. No, I don't recall seeing any.

Q. Chief, based on your experience as a chief officer who holds a master's papers and who has sailed on ships as chief officer since 1943 continuously, what is your opinion [178] as to the seaworthiness of the Sweepstakes for the transportation of wheat flour?"

(Deposition of Anthony Parsons.)

Mr. Howard: Same objection, if the Court please. This witness is asked to state an opinion as to the seaworthiness of the vessel. He is not asked to state facts; he is asked to state an opinion on it, and I submit that is a matter within the province of the trier of the fact.

The Court: The objection is overruled.

“A. In my opinion she was seaworthy in all respects for the carriage of any cargo.

Q. Have you any opinion as to whether it was possible for the wheat flour to come into contact with salt water during the voyage?

A. I don't see how it could be possible.

Q. Chief, do you expect to leave port shortly?

A. Yes, on Friday, I expect.

Q. Friday of this week?

A. Friday of this week.

Mr. Howard: Counsel, as far as the demand for production is concerned, I believe you produced for me [179] the documents you had available covered in this request. I am therefore willing to waive the reading over to page 53 where the questions begin.

Mr. Wakefield: Your Honor, at this time the respondent would like to have marked for identification as Exhibit A-4 two papers stapled together at the top, entitled “Mate's Report of Damaged Cargo, S/S Sweepstakes, Voy. No. 12—S. B., Port Rio de Janeiro, Feb. 22, 1946,” and signed by H. J. Lane, master, and S. Parsons, chief officer.

(Mate's Report marked Respondent's Exhibit A-4 for Identification.)

(Deposition of Anthony Parsons.)

Mr. Howard: Libelant objects to the admission of this document solely on the basis that it has not been identified in the testimony of this witness or any other witness that I recall having testified to date on behalf of respondent that this is the report, or that any of the witnesses had anything to do with signing this report.

Mr. Wakefield: That is the original report of cargo damage at Rio de Janeiro, signed by the master and chief officer. He testifies concerning it in the deposition just read, and it is one of the documents that the libelant demanded, as I recall it. It is an original bearing their signatures. [180]

Mr. Howard: The fact that we may have demanded it does not mean we are bound to allow it to be admitted in evidence. My objection is solely on the basis that it is not properly identified. No witness has testified to this particular document, or identified it. There is some testimony that as a matter of practice they do make some record of damage observed during the course of discharge, but the witness was not asked to identify this document. Counsel must have had it available at the time the deposition was taken and no effort was made to identify it at that time. It is solely on that basis that I object to the admissibility of A-4 for identification.

The Court: Will you point out the proof which you claim properly authenticates this, and as to respondent's right to have it admitted?

(Deposition of Anthony Parsons.)

Mr. Wakefield: I will say this, that document came to me with the depositions and it does not bear—will you see if it bears any identification mark in connection with it?

Mr. Howard: Only the identification mark put on this afternoon in court. It is not listed as one of the exhibits in the index to the deposition, counsel.

Mr. Wakefield: I thought we had just read where he talked about his report. [181]

Mr. Howard: On page 48, there is some reference to the making of such reports, but no mention of a report having been made at Rio de Janeiro on this particular voyage. It is a reference only in general terms, that he prepared reports at all ports.

Mr. Wakefield: On page 48 he does say he prepared a report at Rio, and he doesn't recall any flour being damaged.

Mr. Howard: This document wasn't produced for identification of the witness at the time that question was propounded to him. We have no way of telling that this is the report that the witness had in mind when he said that he did make some report, other than the unsworn testimony that this is the report that counsel received along with the deposition, which is not identified in the deposition.

Mr. Wakefield: I won't offer it at this time. It is marked for identification. It may be dealt with in the cross-examination, Your Honor. With respect to the cross-examination on pages 51, 52 and part of 53, demands are made for

(Deposition of Anthony Parsons.)

various documents, and I understand counsel now to say that those demands were complied with and we need not read that, is that correct?

Mr. Howard: That is correct. Some documents were furnished, including the logbooks and hatch tallies. [182]

“Cross-Examination

“By Mr. Prem:

Q. The master of the Sweepstakes testified that it was his understanding that when damaged cargo was received on board the ship from the dock the ship would give the dock department receipts noting the damaged condition. Are you aware of any such practice?

A. Well, our practice is in all ports——

Q. I am referring now to the port of New York.

A. Well, in the port of New York also, any damage that we observe coming aboard the ship we make a report of it, the mates report damaged cargo.

Q. Well, the captain testified further, he said there was a formal receipt given to the ship for all cargo coming aboard the ship and that where such receipted cargo showed signs of damage they would note that on the receipts given to the dock department.”

Mr. Howard: I believe that is supposed to be “form of receipt,” counsel, rather than “formal receipt.”

“Mr. Lord: I do not recall that, Mr. Prem, in that form.

(Deposition of Anthony Parsons.)

A. Perhaps the captain was referring to dock receipts.

Q. Well, what is your testimony about the type of receipt given in respect of cargo received on board the [183] Sweepstakes?

A. The only type of receipt we handle, we handle no receipts of any sort concerning the cargo, the only thing is we make a report of any cargo we observe damaged, and if it is to any extent then we bring it up with some superiors immediately so they can get the dock receipts endorsed to that extent—if it is anything minor we just make a report on it on a damaged cargo report.

Q. Does the ship keep a copy of the tally slips?

A. We are given a copy of the tally slips before the ship sails.

Q. You have no personal recollection at this time, I take it, of what is on those tally slips?

A. These are tally slips, aren't they (indicating).

Mr. Lord: Witness referring to the hatch tallies.

Q. Have you seen the tally slips which were retained by the vessel, lately?

A. Yes, they are handed to me personally and then I look through them during the voyage.

Q. When did you last look at them?

A. The last time I looked at them would be before I turned them in at Rio.

Q. And that is some years ago? A. Yes.

Q. And you have no recollection at this time of what [184] was on those tally slips?

(Deposition of Anthony Parsons.)

A. No, not the ship's copies.

Q. Where are those tally slips at this time?

A. It is the practice in Rio when the ship arrives to give the stevedore foreman all the Rio tally slips, on which he makes out his list of cargo, so they would be in Rio because they are not returned to us.

Q. Does the stevedore turn those over to the Rio office of Moore-McCormack?

A. I couldn't say.

Q. He does not return them to the ship?

A. No.

Q. I suppose you were below for part of the time while this cargo was being loaded on board the ship?

A. Yes.

Q. So you doubtless saw just a small part of this shipment of flour actually come aboard the ship and stowed in the hold?

A. That's right.

Q. And as I understand it, you came aboard the ship after some of the loading had commenced, so obviously you could not have gone down into the holds to have observed the condition of those holds where the cargo had been so stowed?

A. Not prior to my loading. [185]

Q. Not prior to your going aboard the ship?

A. Not prior to cargo loaded before my being on the ship.

Q. Are you in a position to say at this time what quantity of cargo had been loaded before you went aboard the ship?

(Deposition of Anthony Parsons.)

A. No, I could not, I just have a general recollection of seeing flour there, and other cargo.

Q. How many days had the loading been in progress before you went aboard?

A. I have to check the logbook.

Q. You might take the time to do that.

A. (Referring to logbook): That would be three days prior to my joining the vessel.

Q. How many days was the vessel engaged in loading at New York, actual loading?

A. Seven days.

Q. So that on the basis of the loading time, the vessel was not quite half loaded when you went aboard—three against seven?

A. Well, if you want to arrive at it—that is what the average is.

Q. I presume that in respect to those holds in which cargo had been stowed before you came aboard, you did not go down into those holds to make any examination during the course of loading? [186]

A. We keep a constant check on all the holds.

Q. Well, I am referring now to you personally—did you go down to any of the cargo holds that were in the course of being loaded after your arrival or board the ship?

A. I checked every space that was accessible, that was not blocked off by cargo.

Q. Tell me precisely what you did inspect of those cargo holds in which libellant's flour was stowed, if you recall at this time?

(Deposition of Anthony Parsons.)

A. Well, the only thing I can recall about the flour is that we are very careful about that, especially so that it won't get dirty, the bags, so there would not be any chance of coming up against any metal and having any damage in that respect, so I recall making sure that the spaces were properly protected.

Q. It was not necessary for you to go down into the hold to note that the paper dunnage was properly laid?

A. Oh, yes, it is necessary to go into the hold and check each space individually.

Q. As to the tweendecks, couldn't you observe that without going actually into the tweendecks?

A. No, we go in all the holds and look around as much as possible.

Q. Isn't that one of the jobs you delegate to one of the other officers? [187]

A. No, it is part of my responsibility to see that the cargo is properly stowed.

Q. Is it my understanding that you went into every hold? A. Yes.

Q. You recall that distinctly at this time?

A. Certainly.

Q. Or are you now referring to what your practice is?

A. No, I recall after joining the vessel I made an inspection of all the holds and compartments.

Q. Of course your inspections on those occasions were entirely visual?

(Deposition of Anthony Parsons.)

A. Visual as differentiated from what?

Q. Well, making tests, for instance?

A. Yes, I saw it just to observe the general condition of the holds and the cargo stowed there.

Q. There are many connections and pipes in the hold which escaped your observation, I presume, in the course of your walking around the compartments to see about the paper dunnage?

A. No, we inspect battens to see if there is any missing, and inspect sanitary pipes and wiring.

Q. How long does it take you to make an inspection of that nature in, say, No. 3 tweendeck?

A. Well, it wouldn't take too long, I wouldn't say [188] more than ten minutes.

Q. It would take you about ten minutes to make the inspection that you made on this occasion in No. 3 tweendeck?

A. At the most.

Q. Would it take you a comparable length of time in respect to the other tweendeck spaces in which the flour was stowed?

A. That is according to how much cargo was in at the time, and how much I could inspect.

Q. But you do not have at this time a clear recollection of how much cargo was in each of the holds that were in the progress of loading before you arrived on the vessel?

A. No.

Q. So then I take it that your present recollection of what you did in looking about those holds is somewhat vague at this time?

A. Well, it is the same routine I always follow.

(Deposition of Anthony Parsons.)

Q. That is the point I made before. What you are testifying to now is largely based upon what you usually do when you make an inspection and not what you actually did?

A. I could not recall any fine points of that inspection.

Q. Not what you actually did at that time. Is it based upon what your general practice is?

A. Yes. [189]

Q. As I understand it, on the voyage you encountered no heavy weather?

A. That is correct.

Q. During the period the cargo was being discharged from the cargo compartments to the dock, there again, I presume, you had other duties to attend to and you were not on deck throughout that period to observe the condition of the cargo, isn't that true? A. That's right.

Q. So that it is entirely possible stained bags or caked bags might have come over the ship's side without your personal knowledge?

A. Well, we always have another ship's officer on deck at all times.

Q. Well, so far as you are personally concerned, you did not see any stained or caked bags, but there was a possibility that some could have come overboard onto the dock without your personal observation? A. Yes, there is that possibility.

Q. After the ship was completely discharged did you go down into each of the compartments where

(Deposition of Anthony Parsons.)

the flour was stowed to look around to see whether or not any water did or could have entered?

A. Not only when it was all discharged but during the course of discharge I entered the compartments frequently [190] to see if there was any damaged cargo.

Q. Did you make the same kind of inspection of the cargo compartments at that time as you made at New York during the course of loading?

A. No, that examination is not so thorough.

Q. At what time—at Rio?

A. At discharging.

Q. Your examination was not as thorough at Rio as it was at New York? A. That's right.

Q. I presume your recollection at this time as to the quantity of dunnage that was on shipboard, and particularly in those compartments where libellant's flour was stowed, is rather vague, is not that true?

A. Well, I recall being careful of the flour. The captain had mentioned that we were carrying flour and to make sure that was stowed properly, so I do recall that they had dunnage paper and the three tiers of dunnage.

Q. Well, you of course would not know as to that cargo which was in the course of loading before you got on board, as to what they had on the bottom tier? A. No.

Q. If these sacks of flour were stowed on the ship's skin or some portion of the ship where you did not have paper or wooden dunnage, that would account for this damage, [191] would it not?

(Deposition of Anthony Parsons.)

A. I don't see how it could account for any large amount of damage, even if any flour had been stowed directly with steel, because we did not have any sweat during the voyage—besides, the ship had the wooden battens to protect any cargo coming up against it.

Q. You don't think then that stowing bags of flour against steel on a voyage from New York to Rio leaving New York in January would cause any damage by staining or caking?

A. Oh, it would, yes—I don't say it would cause damage to all the flour, just possibly that part that was against the steel.

Q. Yes, that is the point I make, that it would cause damage to that flour which was in direct contact with the steel plate?

A. It might cause damage.

Q. Have you ever found such damage to exist on any ship?"

Mr. Howard: Your Honor, I will waive that question and the next two subsequent questions because of the ruling that the Court has previously made as to this type of testimony. This is our witness on cross-examination, and I withdraw those questions.

Mr. Wakefield: I don't see any reason for [192] withdrawing it. It is part of his cross-examination, it isn't mine.

The Court: It will not be withdrawn. Proceed.

"Q. Have you ever found such damage to exist on any ship?

(Deposition of Anthony Parsons.)

A. Yes, we have found sweat damage on ships.

Q. Resulting from stowing of bags of flour against steel?

A. Yes, some bags that touched the steel at some point. You were not referring to this voyage, were you, during the course of my time?

Q. My question was directed to voyages other than the one in question. A. That's right.

Q. On direct examination you testified that you had no explanation as to how flour on this voyage became damaged on shipboard. By that answer you mean that you are not aware at this time of any water having entered the vessel during the voyage?

A. That's right, and when I noticed the cargo being discharged I did not see any improper stowage at any time which would allow any cargo to come up against any steel or be damaged in any way, and I observed no sweat damage or sweat there that would allow any bags to get stained. [193]

Q. Well, is it not a fact that a certain degree of sweat develops on every voyage from New York to South American ports, Brazil and the Argentine?

A. Well, that is a very hard question to answer. I have observed some shipments of cargo very closely on ships where they should have sweat and it is not present, and other times where you would not expect sweat to be present we did have it.

Q. But you will admit that it is a very usual experience to have sweat on a voyage from New York to Rio or Santos?

(Deposition of Anthony Parsons.)

A. Ordinarily you might have sweat, yes, condensation.

Q. It is an ever-present danger that you have in mind at the time you stow cargo and you anticipate it?

A. That is why they are so careful in the stowage of it.

Q. I believe you testified that you have no knowledge of the receipt of libellant's cargo of flour from lighters at New York to the dock?

A. No, I don't recall any."

The Court: At this point we will take the mid-afternoon recess. Those connected with this case are excused for at least ten minutes.

(Recess.) [194]

The Court: You may resume the reading of the deposition.

"Redirect Examination

By Mr. Lord:

Q. Are these nine slips of paper which you described as hatch tallies exact copies of the hatch tallies kept by the vessel and surrendered to the agents at discharge port?

A. Yes, these are the originals—we get a carbon copy.

* * *

Q. Now, chief, Mr. Prem has suggested that sort of roughly about half of the vessel may have been loaded before you joined the Sweepstakes in New

(Deposition of Anthony Parsons.)

York. Leaving apart for a moment Mr. Prem's fractions—3 not representing quite half of 7—will you tell us what part of a ship you load first?

* * *

A. Well, since on this voyage as far as I can see all the cargo was loaded in New York, it would be customary to start loading from the hold and then work up.

Q. Again roughly speaking, what percentage of the total cubic for cargo would you say that the lower holds in the Sweepstakes bore to the total cargo space?

* * *

A. Well, roughly speaking, one-half, I would say.

Q. You as chief officer would be the individual on a [195] vessel responsible for stowage, is that not correct?

A. That is correct.

Q. You are the cargo officer?

A. That's right.

Recross-Examination

By Mr. Prem:

Q. Chief, how can you recall at this late date that the hatch tallies which have been handed you are exact copies of the carbons that you gave to the stevedores at Rio?

A. Well, I am only assuming——

Q. That is all.

A. On the face of them, it is the Sweepstakes,

(Deposition of Anthony Parsons.)

the date, that these are the originals of the cargo we loaded.

Q. You have no recollection at this time what was on those carbon copy hatch tallies? A. No.

Redirect Examination

By Mr. Lord:

Q. This writing on the first page in pencil—referring again to these hatch tallies—"Claim 247-212"—would that have appeared on these tallies when you first observed them, and on the ship's copies? A. No, I don't see why it should.

Mr. Lord: For the record, that is the claim number of Moore-McCormack Lines, Inc., relating to the claim which libellant now makes." [196]

Mr. Wakefield: I would like to offer the deposition of Chief Officer Anthony Parsons.

The Court: This deposition of Parsons, the parts read on behalf of respondent, is now received as part of respondent's case in chief.

Mr. Wakefield: If the Court please, at this time respondent offers Respondent's Exhibit A-4, which is the cargo damage report signed by the captain and chief officer. Counsel for libelant has objected to that as not being identified, and for some reason—I assume it was a mistake, but for whatever reason it was—it wasn't identified in the deposition, although the testimony was given concerning it. We offer it at this time merely to put ourselves in the position of giving the Court and libelant any and

(Deposition of Anthony Parsons.)

all evidence or documents pertaining to this voyage and this cargo, and if counsel wishes to object I think the objection is well taken, but we nevertheless offer it.

Mr. Howard: I renew my objection, if the Court please, on the basis that the exhibit has not been identified by any witness testifying to date.

The Court: It is denied admission. It is rejected.

Mr. Wakefield: Next, respondent would like to present the deposition of Mr. A. M. Caswell, the agent at Rio de Janeiro for the respondent. [197]

DEPOSITION OF ALICK CASWELL

Direct Examination

“Interrogatory No. 1: Please state your name, age, nationality and where you now reside.

First—To the First Interrogatory he says:

Alick Mackenzie Caswell, age 51 years, British nationality, Rua Fegundes Ferreira, 541, Niteroi, State of Rio de Janeiro, Brazil.

Interrogatory No. 2: State by whom, where and in what capacity you were employed in February and March, 1946.

Second—To the Second Interrogatory he says:

By Moore-McCormack Navegacao S. A., as Brazilian claims agent.

Interrogatory No. 3: State for how long you have been employed in the above capacity; also

(Deposition of Alick Caswell.)

whether you are still employed by the same concern and in the same capacity.

Third—To the Third Interrogatory he says:

I have been employed since 1938 in the above capacity; I am still employed by the same concern in the same capacity.

Interrogatory No. 4: State the duties of your employment and what experience and training you have had in connection with your present position.

Fourth—To the Fourth Interrogatory he says:

I am responsible to Mr. E. M. Smith, Moore-McCormack Line, Inc., New York, for all claims matters in respect to Moore-McCormack ships in Brazil. I have been connected with shipping since 1919.

Interrogatory No. 5: Are you familiar with a certain shipment of 10,500 bags of wheat flour consigned to Companhia Luz Stearica and shipped on board the S. S. "Sweepstakes" from New York, arriving at Rio de Janeiro about February 20, 1946, and state generally your duties with respect to such shipments.

Fifth—To the Fifth Interrogatory he says:

I am familiar with said shipment. It is my responsibility to acquaint myself with serious damage as discharge proceeds, which I normally carry out by a daily visit to the steamer and by information received from the Moore-McCormack Rio office employees working aboard ship or on the quays—stevedore, foremen, etc.

Interrogatory No. 6: Were you present and on

(Deposition of Alick Caswell.)

board the S. S. Sweepstakes at Rio de Janeiro from time to time when the shipment of 10,500 bags of wheat flour in question, consigned to Companhia Luz Stearica, was being discharged from the vessel?

Sixth—To the Sixth Interrogatory he says:

Yes.

Interrogatory No. 7: Please state the date or dates and hours on those days when the flour was discharged from the vessel.

Seventh—To the Seventh Interrogatory he says:

Night and day on the 21st, 22nd and 23rd days of February, 1946.

(Here witness consulted notes.)

Interrogatory No. 8: If you have available office records showing details of this discharge of flour from the S. S. Sweepstakes, please state what the records show as to the time of discharge and the quantity discharged.

Eighth—To the Eighth Interrogatory he says:

It is impossible to answer this question since part of the shipments of flour ex S. S. Sweepstakes were tallied out by mixed marks.

Interrogatory No. 9: If the shipment of flour in question had been damaged at the time of discharge, would this fact have come to your attention, and please explain.

Ninth—To the Ninth Interrogatory he says:

Employees from my department who are aboard

(Deposition of Alick Caswell.)

checking tallies with manifests as discharge proceeds keep me informed. In addition, foremen, etc., have instructions to telephone me in case of serious damage coming to light; therefore, if the flour showed visible damage, my attention would normally have been called to it.

Interrogatory No. 10: To your knowledge, was the shipment of flour in question damaged in any respect, or was it wet or damp from water or otherwise at the time it was discharged from the vessel, and please explain fully your answer.

Tenth—To the Tenth Interrogatory he says: [200]

I have no knowledge of any damage to this flour either by water or other form of damage visible at the time of discharge.

Interrogatory No. 11: What is the usual procedure of a vessel concerning the discharge and delivery of a shipment of flour at Rio de Janeiro?

Eleventh—To the Eleventh Interrogatory he says:

Flour can be delivered to customs warehouse either alongside steamer or to other customs warehouses designated. If consignees pay duty prior to or immediately upon steamer's arrival they can generally obtain permission from the port authorities to have flour delivered to rail cars or trucks for conveyance to their private deposits.

Interrogatory No. 12: Was the usual procedure followed in this instance of discharge from the S. S. Sweepstakes on or about February 20, 1946, and if it was not, please explain fully.

(Deposition of Alick Caswell.)

Twelfth—To the Twelfth Interrogatory he says:

The shipment in question was delivered to rail cars alongside for conveyance to consignee's mill.

Interrogatory No. 13: What instructions did you receive from the consignee, Companhia Luz Stearica, regarding discharge and delivery of the flour and what was actually done in this connection?

Thirteenth—To the Thirteenth Interrogatory he says: [201]

I received no instructions from Cia. Luz Stearica regarding discharge and delivery of their flour. In Rio de Janeiro, all instructions as to where cargo is to be delivered are received by steamer's agent from docks administration who supply the necessary rail car. Probably Cia. Luz Stearica, after obtaining the necessary authority from customs and docks administration, instructed the docks administration of their requirements; in such cases, once cargo is delivered to rail cars alongside it is considered as delivered to customs and responsibility of the steamship company ceases from that time.

Interrogatory No. 14: If instructions received by you were in writing, set forth a copy if you have a copy, otherwise state the substance of such instructions and from whom and when you received them.

Fourteenth—To the Fourteenth Interrogatory he says:

This is replied to in question 13.

Interrogatory No. 15: If in answer to the two

(Deposition of Alick Caswell.)

preceding interrogatories you have stated that cargo was delivered directly by the ship into wagons or railway cars alongside the ship, please state who arranged for the wagons or cars and whether delivery into the cars in this instance constituted delivery to the consignee.

Fifteenth—To the Fifteenth Interrogatory he says:

This is replied to in question 13. [202]

Interrogatory No. 16: In connection with the preceding interrogatory, if you can, state from your records the details of discharge into such cars, such as the dates, quantity, number of car, number of bags and other details of delivery of the shipment of flour to the consignee, libelant Companhia Luz Stearica.

Sixteenth—To the Sixteenth Interrogatory he says:

It is impossible to answer this question since part of the shipment of flour ex S. S. Sweepstakes were tallied out mixed marks.

Interrogatory No. 17: Was any inspection made of the flour during discharge into the cars or wagons, and by whom was it made?

Seventeenth—To the Seventeenth Interrogatory he says:

To my knowledge, no detailed inspection was made.

Interrogatory No. 18: In connection with the requirements of the Customs at Rio de Janeiro, please state the usual procedure for discharging a cargo of flour, including in detail just what is done, what in-

(Deposition of Alick Caswell.)

spections and reports are made, and state in what respects the discharge of the flour in question in this case from the S. S. Sweepstakes on or about February 20, 1946, differed from the usual procedure and who made the arrangements for this method of discharge?

Eighteenth—To the Eighteenth Interrogatory he says: [203]

A customs house guard and dock tally clerk are responsible, together with our own tally clerk, for noting in official register the mark and weight of torn bags and/or mark and quantity of damaged bags; the procedure in reference to the flour ex S. S. Sweepstakes did not differ from the usual procedure covering flour despatched for delivery to consignee's deposit.

Interrogatory No. 19: Do you or the Steamship Company or the vessel have any control over or responsibility for the cargo after it is discharged into the wagons or cars alongside the vessel, and if not, please explain, if you know, how the cargo of flour is or was handled after being loaded into the cars. Nineteenth—To the Nineteenth Interrogatory he says:

Our responsibility ceases once the flour is discharged to rail cars; once the cargo is delivered, the rail cars are out of our control, but presumably they were shunted to Cia. Luz Stearica's mill and there discharged.

Interrogatory No. 20: If cargo is damaged upon

(Deposition of Alick Caswell.)

discharge, do you receive any report of such damage from the Customs at Rio de Janeiro?

Twentieth—To the Twentieth Interrogatory he says:

Damage is noted on official customs register, which register is available for our inspection.

Interrogatory No. 21: Did you receive any report [204] of any damage to the flour discharged from the S. S. Sweepstakes on or about February 20, 1946, and consigned to libelant Companhia Luz Stearica?

Twenty-First—To the Twenty-First Interrogatory he says:

No.

Interrogatory No. 22: What do the Customs records at Rio de Janeiro show with respect to any damage to this flour, and if a report or records are available, please attach a copy of the record or certificate to this deposition.

Twenty-Second—To the Twenty-Second Interrogatory he says:

Customs records for this shipment indicate no damage to the flour in question; the only means of obtaining confirmation of contents of customs register is to petition for that information by customs certificate; since the obtaining of said certificate takes time, it is not available for attaching to this reply.

Interrogatory No. 23: On what date did you first receive any notice from the consignee, Companhia

(Deposition of Alick Caswell.)

Luz Stearica, or from anyone else that there was alleged damage to the shipment of flour in question by reason of being wet, and if such notice in writing, please attach a copy to this deposition.

Twenty-Third—To the Twenty-Third Interrogatory he says:

Our files do not disclose any communication from consignee. However, part of the file on this claim is with [205] our New York office.

Interrogatory No. 24: Did you reply to the notice of damage and if so, set forth a copy of your reply to be attached to this deposition.

Twenty-Fourth—To the Twenty-Fourth Interrogatory he says:

See my answer to question 23.

Interrogatory No. 25: Were you or your company or the vessel or anyone on their behalf given any opportunity to inspect any of the alleged damaged flour, or to obtain samples of the same.

Twenty-Fifth—To the Twenty-Fifth Interrogatory he says:

No.

Interrogatory No. 26: If in answer to the preceding interrogatory you state that you did examine the flour, please set forth in full your findings, but if you did not have any opportunity to examine it, please explain why you could not examine the flour in question.

Twenty-Sixth—To the Twenty-Sixth Interrogatory he says:

(Deposition of Alick Caswell.)

We were not invited to examine the flour.

Interrogatory No. 27: Please describe the wagons or cars into which this shipment of flour was discharged, with particular reference to whether they are covered or uncovered, or are otherwise protected in any way from the rain and weather.

Twenty-Seventh—To the Twenty-Seventh Interrogatory he says: [206]

Flour is normally discharged to open freight cars and covered by tarpaulin; covering of rail cars by tarpaulin is the responsibility of the docks administration; I cannot recall at this date whether the rail cars in question were properly covered or whether the tarpaulins were in good condition.

Interrogatory No. 28: If you can recall, or if your records so indicate, please state whether or not it rained in Rio de Janeiro at any time between February 22, 1946, and March 6, 1946, and, if you know, on what days and to what extent, or for what period of time.

Twenty-Eighth—To the Twenty-Eighth Interrogatory he says:

I cannot say offhand whether it rained in Rio de Janeiro between February 22 and March 6, 1946.

Interrogatory No. 29: If you know, please state whether any of the flour in question was discharged from the S. S. Sweepstakes on February 20, 1946, or thereafter in the rain, and please explain fully what was done by the vessel in this respect.

Twenty-Ninth—To the Twenty-Ninth Interrogatory he says:

(Deposition of Alick Caswell.)

Customs house guards are not permitted to discharge flour during rain.

Interrogatory No. 30: To your knowledge, was any cargo carried on the S. S. Sweepstakes on the voyage in question damaged by salt water or damaged in any other respect. [207]

Thirtieth—To the Thirtieth Interrogatory he says:

To my knowledge no cargo carried on the S. S. Sweepstakes on the voyage in question was damaged by salt water. I have no record of any other damage except normal breakage through handling.

Interrogatory No. 31: If there had been damage to the cargo on the S. S. Sweepstakes on the voyage in question, how would such damage have come to your attention, and please explain fully.

Thirty-First—To the Thirty-First Interrogatory he says:

Such damage would have come to my attention through the records in the customs house register and by verbal advice from stevedores and/or our own employees, as explained above.

Interrogatory No. 32: Assuming that some portion of the shipment of flour in question was wet or damp, or had been wet or damp when it arrived at consignee's warehouse, or otherwise came into consignee's possession on or about March 5 or 6, 1946, state, if you know, how such condition could have been caused if it was not in such wet condition when it was discharged from the vessel."

Mr. Howard: On behalf of libelant, we object

(Deposition of Alick Caswell.)

to this question, since he has not been qualified as an expert to express an opinion on a hypothetical question as to how this cargo could have been damaged. This man [208] is identified as a claims agent, for about eight years up to the time of this incident at Rio de Janeiro. The question assumes that the witness has been qualified as an expert to express an opinion as an expert witness on this question.

Furthermore, the question has the wrong date as to the time of delivery, received "on or about March 5 or 6." All of the testimony in this record shows the flour was received prior to or by March 2. I submit this witness is not qualified.

The Court: One witness said that discharging from the vessel was completed on the 25th of February, didn't he?

Mr. Wakefield: That is correct.

Mr. Howard: My statement was that the cargo was received by the consignee at consignee's warehouse by March 2.

Mr. Wakefield: The dates of March 5 and 6 are the dates that the survey was made. The witness Ramos by his deposition testified that he made two surveys of this damaged flour at the libelant's warehouse. One was, as I recall, March 6, which is the only purpose of that March 6 date, that being the date of the survey.

The Court: The objection, I believe, should be overruled. It is so ordered. [209]

(Deposition of Alick Caswell.)

“Thirty-Second—To the Thirty-Second Interrogatory he says:

Such damage could have been caused through flour becoming wet while waiting in rail cars, through faulty tarpaulins, or through consignee's discharging at their deposit in rain.

Interrogatory No. 33: If there is anything additional you can add to the matters covered in the foregoing interrogatories pertaining to the problem in question, please make a statement in respect of such matters.

Thirty-Third—To the Thirty-Third Interrogatory he says:

I wish to add nothing to the above.

Cross-Interrogatories

No. 1. In connection with your answers to the direct interrogatories, please state with whom you have discussed this matter prior to the taking of this deposition.

First—To the First Cross-Interrogatory he says:

I have discussed it with nobody.

No. 2. What records, if any, have you examined to refresh your recollection or to enable you to testify?

Second—To the Second Cross-Interrogatory he says:

Only tallies.

No. 3. In answering direct interrogatories No. 5 through 8, and No. 12 through 17, please state

(Deposition of Alick Caswell.)

whether you [210] are testifying from your own memory or from some written records, and if from written records, please state (a) what these records are, and when they were prepared; (b) who prepared the records; (c) where you obtained the records; and (d) where the records have been kept since they were prepared.

Third—To the Third Cross-Interrogatory he says:

I testified from my own memory, except for questions No. 7 and No. 8, for which information was obtained from tallies.

- (a) Tallies prepared during discharge of flour.
- (b) Tally clerks.
- (c) From our own files.
- (d) In the Moore-McCormack office in Rio.

No. 4. State whether or not you personally inspected or examined individual bags of flour discharged from the steamer "Sweepstakes" and consigned to Cia. Luz Stearica.

Fourth—To the Fourth Cross-Interrogatory he says:

No.

No. 5. In connection with your answers to direct interrogatory No. 10 and direct interrogatories No. 30 and 31, please state whether or not it is possible that the flour shipment was damaged, dampened or wetted upon discharge from the steamer "Sweepstakes" at Rio de Janeiro without such [211] fact being known to you until receipt of notice of claim from the consignee.

(Deposition of Alick Caswell.)

Fifth—To the Fifth Cross-Interrogatory he says:

I think it is extremely unlikely that any extensive water damage could have escaped my attention, the attention of the stevedores, tally clerks and docks and customs house personnel.

No. 6. Is it not a fact that all, or practically all, shipments of flour discharged at Rio de Janeiro must be transported in the same or similar manner to consignee's premises from dockside, either after passing through Customs Warehouse, or without passing through Customs Warehouse?

Sixth—To the Sixth Cross-Interrogatory he says:

Quantities of flour are discharged to docks warehouse for delivery to customs; after duties are paid, delivery is taken by consignee as they require. Equally, quite a number of consignees take delivery direct from alongside; this especially applied during the period of congestion of docks warehouses as ruled when the S. S. Sweepstakes was in port. In cases of flour being discharged to customs warehouses, I am unable to state whether consignees normally take their flour away by rail car or by truck, or where they take it.

No. 7. Please state the date and hour on that day when your records show that discharge of the shipment of flour from the steamer "Sweepstakes," consigned to Cia. Luz [212] Stearica, was completed.

Seventh—To the Seventh Cross-Interrgatory he says:

I am unable to answer this question without consulting our records.

(Deposition of Alick Caswell.)

No. 8. Did you receive the original of the attached letter from Cia. Luz Stearica, dated March 2, 1948, and marked for identification as Exhibit 6? Eighth—To the Eighth Cross-Interrogatory he says:

(Exhibit 6 was not received.)

I am unable to answer this question, inasmuch as Exhibit 6 is missing.

* * *

No. 11. Did you or your representatives inspect the flour after arrival at consignee's warehouse and receipt of notice of damage claim?

Eleventh—To the Eleventh Cross-Interrogatory he says:

No.

No. 12. Did you or your representatives request an opportunity to inspect all or any portion of the flour after arrival at consignee's warehouse and after your receipt of notice of damage claim?

Twelfth—To the Twelfth Cross-Interrogatory he says:

No.

No. 13. Were either you or your representatives denied the opportunity to inspect the flour after arrival [213] at consignee's warehouse and your receipt of notice of damage claim?

Thirteenth—To the Thirteenth Cross-Interrogatory he says:

No.

* * *

(Deposition of Alick Caswell.)

No. 16. Was a chemical analysis obtained of any samples taken from the flour?

Sixteenth—To the Sixteenth Cross-Interrogatory he says:

Not by Moore-McCormack.

* * *

No. 18. If no samples were taken by you or your representatives of the flour after arrival at consignee's warehouse and your receipt of consignee's notice of damage claim, please state why samples were not obtained and explain in detail.

Eighteenth—To the Eighteenth Cross-Interrogatory he says:

We did not survey the flour; therefore, we did not take samples.

No. 19. State with whom you have discussed the testimony you are now giving, either in person or by written communication, and state also when you discussed it on each occasion that you discussed it.

Nineteenth—To the Nineteenth Cross-Interrogatory he says:

I have not discussed it with anyone." [214]

Mr. Wakefield: I would like again, if the Court please, to mention in connection with this deposition of Mr. Caswell—

The Court: Before you mention that, is it not your desire to have this deposition received in evidence as a part of respondent's case in chief?

Mr. Wakefield: Yes, Your Honor.

The Court: It is so ordered.

Mr. Wakefield: In Libelant's Exhibit 3, consisting of two letters, one dated March 2 and the other one March 9, which were offered and admitted yesterday without objection on my part, I call attention to the fact that those letters were referred to in this deposition on cross-examination under interrogatory No. 8, but the exhibit was not transmitted with the interrogatories and the witness was unable to answer it. I want that to be stated so it wouldn't appear that the witness had denied writing the letter.

Mr. Howard: In that connection, if the Court please, the witness did further testify that he was not able to produce the letter because part of his file was in New York.

The Court: Let the record show those things
Call the next witness.

Mr. Wakefield: If the Court please, on the question [215] of the chemical analysis, and the testimony of Dr. Barreto offered by the libelant yesterday, the respondent would now like to call Mr. Williams, and to request permission for Mr. Crutcher to examine this witness, all of which goes to the issue of the salt water and chemical testimony.

The Court: The request in all respects is granted.

THOMAS WILLIAMS

called as a witness by and on behalf of respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Crutcher:

Q. Will you state your name to the Court?

A. Thomas Williams.

Q. Your profession is what? A. Chemist.

Q. Are you a resident of Seattle?

A. Yes, sir.

Q. What is your business? [216]

A. I am a partner of Northwest Laboratories, a chemical laboratory.

Q. Will you state some of your professional qualifications?

A. I graduated with a Bachelor of Science degree in chemistry, and have participated in the field of chemistry for—ever since 1934, fifteen years.

Q. Do you have a professional engineers' license?

A. I am registered in the state of Ohio as a professional chemical engineer. I have not registered in the state of Washington, although the license is reciprocal. I am registered in the National Society of Professional Engineers.

Q. In the course of your professional duties, do you have occasion to make analyses of various substances and matters? A. Yes.

Q. Have you had experience in analyzing grains and cereals? A. Yes, sir.

(Testimony of Thomas Williams.)

Q. Have you ever had occasion to make analyses for contamination by sea water?

A. We have analyzed cereal feeds for possible contamination of salt water.

Q. Is the problem of analysis in such matters similar [217] or akin to that in analyzing wheat flour?

A. Similar, I would say.

Q. Do you consider yourself qualified to make analyses of salt water contamination of wheat flour?

A. Yes, sir.

Q. Showing you Libellant's Exhibit 4, purporting to be a chemist's report, by Dr. Barreto, I ask you whether you have heretofore examined a copy of that report?

A. I have.

Q. And the translation thereof?

A. Yes, sir.

Q. I ask you whether you have also examined the copy of the questions propounded to Dr. Barreto and the answers, being in the form of a deposition in this proceeding?

A. I have reviewed that, yes, sir.

Q. Before proceeding with an analysis of that report, would you please explain to the Court in a few simple words the essential difference between a qualitative and a quantitative analysis from a chemist's viewpoint?

A. A qualitative analysis is for the discernment of the product, an element or a compound. That is distinguished from a quantitative analysis in that a quantitative analysis determines the amount pres-

(Testimony of Thomas Williams.)

ent and is reported in terms of a quantity. A qualitative analysis in no sense indicates quantity of material. [218]

Q. With reference to the elements of sodium and chloride or chlorine, I ask you whether you have examined technical works or are otherwise familiar with the content in wheat flour of those elements?

A. Yes, I have reviewed references.

Q. Would you state what your references indicate with respect to the content of wheat flour as to sodium and chloride?

A. In Winton, the amounts are very small. The largest quantity of chloride present in the ash from wheat flour that I was able to find was .11 per cent. That is based on the ash content of the flour. That was reported by Winton. I have the reference, if you want it.

Q. That is sufficient. Is it true or not true that wheat flour normally contains both sodium and chloride or chlorine?

A. Yes, it contains both sodium and chloride.

Q. In order to determine whether or not wheat flour is contaminated with sea water or fresh water or is not contaminated with either one of those elements, and having reference to the quantity or presence in the sample of chloride and sodium, would a qualitative analysis, in your opinion, be a sufficient test to disclose the nature of the contamination?

A. A qualitative could not be considered as positive [219] evidence.

* * *

(Testimony of Thomas Williams.)

Q. In the chemical profession, is there any standard which might be denominated international so far as procedure in reporting the results of analyses is concerned, if you know? [220]

A. Basically, we have certain universal systems. Chemistry is a universal science, it is not limited to any one particular locality. Reports are first of all reported in terms of percentage, and procedures are standardized. We have such standards as ASTM, which is the American Standard for Testing Materials.

Mr. Howard: I believe he has answered the question, and what he is now speaking is beyond the scope of the question.

Q. That is sufficient. In the testing of cereals for contamination, if you know, is there any accepted or authorized method of procedure applicable to the chemical profession throughout the world?

A. I am sorry, I didn't understand your question.

Q. If you know, would chemists in another country use procedures which would likewise be used by chemists in this country in seeking to determine the nature of contamination of wheat flour?

Mr. Howard: If you know.

A. Well, there is a question here—may I sort of go a little off the subject?

Q. You may explain the basis of your answer.

A. Actually, there isn't just one test that you can use to discern contamination. That is a loose

(Testimony of Thomas Williams.)

term, to start with. You are discussing here the contamination of [221] flour with salt water or sea water. One of the tests that we would use would be the discernment qualitatively and quantitatively of sodium chloride, which is a constituent of sea water. It would be one of the steps you would take. I am not certain it would be the only step, but it would be one of the steps.

Q. That would be regardless of the country in which the chemist was doing his work?

A. Regardless of the country in which the chemist was doing his work, the procedure would be standard. There are accepted methods in any country of the world for doing that.

Q. Are those accepted methods set forth in any book or series of books?

A. As far as I know, yes. We have our official Methods of Agricultural Chemists, which is published in every civilized country in the world. It is accepted as a standard.

Q. Have you had occasion to examine reports of chemists from other countries?

A. I have had no occasion to for a——

Q. I hadn't quite finished my question. Either in the course of your own business or in chemists' professional journals?

A. In the course of our business, we have to be familiar with the activities in other countries, and it is [222] quite commonplace to review the literature from France, Germany, Sweden and other for-

(Testimony of Thomas Williams.)

eign countries, South America being one of them.

Q. Referring again to the exhibit before you, being the report of Dr. Barreto, would it appear to you as a professional chemist that such report is the report of a qualitative or a quantitative analysis?

A. This is a qualitative analysis.

Q. Will you state your reasons for so concluding?

A. The reason for so stating that is because no quantitative data has been presented. There are no quantities of materials indicated.

Q. In what form would the report be had a quantitative analysis been conducted?

A. Well, you would have discerned percentage composition, the percentages of the constituents that he analyzed for. For instance, sodium chloride would have been reported in terms of percentage.

Q. Is there any question in your mind about that?

A. No question whatsoever.

Q. Referring to Dr. Barreto's report, do you recall whether therein he states that he separately examined the sack fabric from samples?

A. I must confess that I believe I recall that.

Q. Assuming that he did so, that in Dr. Barreto's deposition he stated he did, would there be a separate report of the results of the examination of such fabric?

Mr. Howard: I object. He says, "would there be a separate report." That is very tenuous, it seems to me. The report speaks for itself. What this wit-

(Testimony of Thomas Williams.)

ness might do in making a chemical analysis and report might be entirely different from what a chemist in Rio might do. Furthermore, this witness might have some particular basis by reason of his experience locally that would afford a reason why he would answer this question one way or another. I see no basis for such a question being asked this witness.

Mr. Crutcher: I withdraw the question. I think the objection is properly taken.

Q. Assuming that a professional chemist acting according to accepted standards in the international chemists profession had made a separate examination of sack fabric, would he in the normal course of events, that is, if you know, report the contents of such an examination separately?

Mr. Howard: If the Court please, my objection runs also to this question for the same reasons, asking this witness to assume that a separate examination was made. Now, counsel is asking whether he would expect such a chemist to make a separate report of bag samples. I say that depends entirely on the conditions of the [224] survey, the circumstances under which it was made, the nature of the request for the survey, and how extensive a report was expected or requested from the person obtaining the survey.

The Court: The objection is overruled.

The Witness: In determining the fabric, that is one separate part of the whole here. It is quite

(Testimony of Thomas Williams.)

probable to presume that the fabric could be contaminated with salt from the spray or salt water.

Mr. Howard: The witness is now deviating beyond the scope of the question.

The Court: Sustained.

Q. Referring to Dr. Barreto's deposition, do you recall whether he stated therein that he made a separate analysis of sound flour from the same shipment? A. I believe he did.

Q. Again referring to the standard among professional chemists prevailing throughout the civilized world, state, if you know, whether a report of comparative analysis, that is, comparative quantitative analyses, would in the normal course of events as a matter of professional practice be reported separately?

Mr. Howard: Same objection, if the Court please. What might happen in the normal course of events is not determinative of what is proper in this case. There [225] may have been a request for a separate analysis on sound flour, or a separate report, and that would be covered, I submit to Your Honor, entirely apart from any standard that may be prevailing throughout the world. If the client or customer requested a separate analysis or report, it seems to me it is obvious that would be the determining basis of whether such a report was submitted.

Mr. Crutcher: My response is that Dr. Barreto in his deposition did testify that he made a separate

(Testimony of Thomas Williams.)

comparative analysis both of flour deliberately contaminated with sea water, and I believe on cross-examination he stated he made a separate analysis of sound flour.

I offer to prove by this witness that sound professional procedure, irrespective of nationality, of chemists requires that.

Mr. Howard: You are making an offer of proof now?

Mr. Crutcher: That is correct.

Mr. Howard: The Court has not ruled on the objection yet.

The Court: The objection is overruled.

Mr. Howard: The question, as I recall, said "in the normal course of events."

The Court: Read the question. [226]

(Last question read by reporter.)

The Witness: Yes, sir.

Q. Making the same assumption, would an analysis of flour deliberately contaminated by sea water be separately reported? A. Yes, sir.

Q. Referring to the distinction between a qualitative analysis and a quantitative analysis, is a qualitative analysis, in your opinion as a professional chemist, a safe basis for determining whether flour has been contaminated with fresh water or salt water?

Mr. Howard: If the Court please, libellant objects to this question because it calls for an opinion based upon an opinion. In other words, this witness,

(Testimony of Thomas Williams.)

who has qualified as an expert chemist practicing locally in the city of Seattle, is now called upon to pass an opinion on the opinion of the witness down in Rio de Janeiro, Dr. Barreto, the chemist. I submit to Your Honor that is entirely within the province of the trier of the fact, and is not a proper subject for the examination of an expert witness.

This witness can be asked what he might do, or what tests he might make, but he is now asked a question which calls for an opinion as to the validity of someone else's opinion. I submit that is entirely improper. [227]

Mr. Crutcher: My response is that I believe counsel misapprehends the purport of the question. I am asking the witness as a professional chemist whether in his opinion, and entirely aside from the facts in this particular case, it is reliable to depend upon qualitative analysis alone to determine whether contamination is fresh water or salt water.

The Court: The objection is sustained, with leave for you to determine from the witness how he would determine the facts which you think are material for the chemist professionally to ascertain.

Q. What is the method normally employed in the chemical profession at large to make a qualitative analysis of some cereal matter contaminated with sea water?

A. Do you want me to recite the qualitative procedure?

Q. Very briefly, yes, with reference both to sodium and chloride.

(Testimony of Thomas Williams.)

A. Sodium is determined by the flame spectra, ashing the material and then conducting the flame test. It is best and generally necessary in order to get a positive answer to view the flame with a spectroscope, even a small utility spectroscope. That will distinguish the presence or absence of sodium.

The test for chloride is conducted by means of its reaction with silver nitrate, whereby white precipitate in [228] solution is discerned if chlorides are present.

* * *

Q. If the problem were presented to you as a professional chemist to determine whether flour had been contaminated by salt water or some other type of water, would you be content with conducting the tests which you have just described as a basis for making a report to a client in your professional capacity? A. No.

Q. Would you state your reasons for that answer?

A. It is necessary, in order to prove a conclusion, to report and show quantitative data. It is necessary to do that—if you want me to elaborate somewhat—to determine the quantity of sodium and the quantity of chloride to make certain that they are in combination as sodium chloride, among other things. [229]

Q. Do you have occasion to correspond with other chemists and ask analyses from them and transmit analyses to them? A. On occasion.

Q. If a report such as that which has been shown

(Testimony of Thomas Williams.)

to you were furnished, would you consider that because it had been rendered by a professional chemist that it was adequate, an adequate basis for the conclusion drawn by Dr. Barreto at the conclusion of that report:

Mr. Howard: I object to that question.

The Court: Sustained. I think you had better change the line of inquiry. Stay away from asking this witness to comment upon the validity or carefulness or thoroughness of other witness' testimony.

Mr. Crutcher: Your Honor, I recognize that in the ordinary course of events such testimony is not admitted. This is a peculiar case in that the only opportunity that we had to cross-examine Dr. Barreto as to his skill or credibility was by means of cross-interrogatories, which, as Wigmore has recognized, are quite inadequate in the case of technical experts.

The evidence that we are considering goes to the very heart of this case, because if Your Honor finds that the contamination was by sea water, it casts upon us the strong burden. In fact, for practical purposes, [230] the vessel's liability is determined. The only basis for concluding that this damage resulted from sea water is Dr. Barreto's analysis. As has been heretofore indicated in the testimony, the ethics of the report are open to strong doubt. This is a matter within Your Honor's discretion, I recognize, but I feel that the evidence is important and should in the exercise of your discretion be admitted.

(Testimony of Thomas Williams.)

My authorities are very limited. In 58 Am. Jur., Sec. 677, under "Witnesses," it is stated that, "While the credibility of a witness is ordinarily to be tested by cross-examination, it may be proper to do so by the testimony of an expert especially qualified in respect to the subject matter." It is further noted in that section that the scope of such examination rests "* * * in the sound discretion of the court."

There are two points that can be brought out by such testimony. One affects the credibility of the report of Dr. Barreto and his subsequent testimony to things which do not appear in his report. The other concerns his skill as a chemist.

The Court: The objection is sustained. The ruling will stand.

Q. On the basis of Dr. Barreto's report, referred to as Exhibit 4, is it possible for you as a professional [231] chemist to conclude that the damage in this case was due to sea water?

Mr. Howard: I object to that question for the same reason. It invades the province of the trier of the fact. It is up to the trier of the fact to weigh this testimony.

The Court: Read the question.

(Last question read by reporter.)

Mr. Crutcher: Perhaps to that should be added "to the exclusion of any other type of water."

Mr. Howard: I submit to Your Honor that is a question to be determined by the Court.

(Testimony of Thomas Williams.)

The Court: The question is not in proper form. First find out whether or not he could make such a determination. Then it is a question later as to whether or not he may be able to state what his determination is.

Q. Would it be possible for you to conclude from Dr. Barreto's report, which is before you as Exhibit 4, as a professional chemist to conclude to your own satisfaction that the damage with which we are concerned in this case was the result of sea water or some other type of water?

Mr. Howard: Same objection.

The Court: The objection is sustained, with leave to ask the witness whether or not he can tell from that [232] report whether or not the damage was due to sea water or some other kind of water.

Q. Can you tell from that report which is before you as Libelant's Exhibit 4 whether the damage in this case was due to sea water or some other type of water?

The Court: The answer should be yes or no.

The Witness: No.

Q. Would you state the reason for that answer?

A. Because of the lack of quantitative data to support such conclusion.

Q. Turning briefly to other questions, in the management of a chemist's laboratory, is there such a thing as a standard practice with reference to the retention of records relating to analyses?

Mr. Howard: I object to that unless the witness

(Testimony of Thomas Williams.)

is asked whether he is familiar with what the standard practice is at the Port of Rio de Janeiro, Brazil.

Mr. Crutcher: I asked whether there was such a thing as a standard practice among professional chemists.

The Court: Is this the same kind of practice you previously inquired about?

Mr. Crutcher: No, Your Honor. My point now is——

The Court: You had better develop the witness' knowledge as to this particular kind of standard you are talking about. If you have not previously gone [233] into it, qualify him as to this particular standard.

Q. I ask you whether you know if there is a standard practice among professional chemists throughout the civilized world with respect to the retention of records of analyses made?

Mr. Howard: I renew my objection unless the question is directed to what the practice is at the Port of Rio de Janeiro, Brazil, or other Brazilian ports.

Mr. Crutcher: Your Honor, I asked whether there was a practice standard to the chemical profession throughout the civilized world. If Rio has a peculiar custom, that is a proper subject for cross-examination, I should think.

The Court: You may ask the question. The objection is overruled.

(Testimony of Thomas Williams.)

Q. Answer yes or no.

A. I can't answer the question yes or no, except by saying that normal practice in laboratories in this country, to the best of my knowledge, is to retain records until they believe them to be no longer of any value.

Q. But you do not know whether that practice extends to other countries?

Mr. Howard: I move to strike the last part of his last answer as not responsive.

The Court: It is stricken and the Court will disregard [234] it.

Q. Do you know whether there is any standard practice such as we have been talking about with respect to retention of samples?

Mr. Howard: Same objection.

The Court: It is sustained. Suppose there was such a one and the witness Barreto didn't do it, what difference would it make?

Mr. Crutcher: It would tend to indicate that either the sample or test record had been suppressed, or that he is not the type of a professional man who does what other normal chemists do. Our point is that—well, that is a matter of argument.

Mr. Howard: I understand there is no question to the witness now.

The Court: That is my understanding.

Mr. Crutcher: That is correct. That is all for the respondent.

(Testimony of Thomas Williams.)

Cross-Examination

By Mr. Howard:

Q. When did you review the Barreto deposition?

A. This last week. I was given the report on the 25th of October.

Q. Do you recall this question having been asked of [235] Dr. Barreto, "Were separate analyses made on the flour samples and upon the bags or packing material in which the flour was contained?" to which Dr. Barreto's answer was, "Yes"? Do you recall that?

A. Not too well, sir. I just read it over once. I would have to review it again to make certain of that.

Q. Do you recall this question having been asked, "Was a comparative analysis made of the samples of flour submitted to you by Companhia Imobiliaria Financeira Americana S. A. and other flour intentionally contaminated by salt water?" to which the witness answered, "Yes, I always make this comparative test for all kinds of analyses." Do you remember that?

A. Yes, I do remember that.

Q. Do you recall this question having been asked, "Did you make a quantitative examination of both the damaged and undamaged flour?" to which the witness responded, "Yes."? Do you remember that?

A. I believe so.

(Testimony of Thomas Williams.)

Q. On the basis of those questions and answers propounded to Dr. Barreto, and refreshing your memory as to those, are you still of the opinion that the report and the translation of the report, being Libelant's Exhibit 4, is insufficient to establish salt water damage to a shipment where the chemist in making the report has said, "By the [236] result of the above analysis, I conclude that the damage ascertained must be attributed to salt water"?

A. "Above analysis" is not sufficient to come to any conclusion of that kind.

Q. Does the sodium and chloride content of wheat flour vary in different grades of flour?

A. From my references, yes.

Q. Is there an appreciable variation or a minor, slight variation?

A. At most, the chloride content is in minute quantities. It does vary. At most, the chloride content of ash from flour is present in small amounts, and does vary, according to the literature.

Q. Is the variation large or small?

A. Well, in terms of the amounts, it is large.

Q. Can you illustrate that?

A. One ash is reported as having .11 chloride content; another is reported as having none.

Q. What is the text that you are referring to on that?

A. B. Wiley Winton, Vol. 1, 1932, p. 238, Structure and Composition of Foods.

Q. As I understood your testimony on direct

(Testimony of Thomas Williams.)

examination, you said that a qualitative analysis was not positive evidence of salt water damage, is that correct? A. That is correct. [237]

Q. In making the test for the sodium content of a suspected sample of any commodity such as flour or other cereal, will you describe to the Court what you would observe visually on a qualitative analysis by the flame test of ash when it is burned?

A. You should exhibit a well-defined spectrum in the flame of the ash.

Q. What color?

A. Yellow, a yellow flame.

Q. State whether or not color and intensity of that flame would vary according to the content, the quantity of sodium in the sample?

A. Possibly so. It is almost impossible to discern visually, however.

Q. Have you ever made a comparative analysis by the sodium flame test of samples of a suspected cereal as between fresh water and salt water contamination? A. No.

Q. Have you ever had any occasion to observe whether there was a difference in the intensity or color of flame on the sodium flame test of samples intentionally contaminated with salt water and fresh water?

A. I have never conducted a test myself, sir, in that respect.

Q. You are unable to give an answer as to whether there [238] would be any difference in the color and intensity of the flame on such a test?

(Testimony of Thomas Williams.)

A. I am, yes.

Q. You mentioned a silver nitrate test as being the method that you would adopt for testing for chloride in a suspected sample on a qualitative procedure?

A. Yes, sir.

Q. Is that otherwise known as the Volhard process?

A. There is a distinction between that and the Volhard process. The Volhard employs as a reagent, one of its reagents, silver nitrate.

Q. Is the Volhard process a qualitative or quantitative process?

A. A quantitative test, it is used as a quantitative measure. It could be construed, however, to be either one, but as I say, our practice is using Volhard's method as a quantitative test for chlorides.

Q. Do you recall Dr. Barreto having testified in a deposition that he used the Volhard method for determining the chloride content of suspected samples in this shipment?

A. Yes, sir.

Q. Then you would construe that to be a quantitative test?

A. The Volhard test is generally used as a quantitative test. [239]

Q. It can also be used as a qualitative test?

A. It can also be used as a qualitative test.

Q. Do you consider use of the Volhard process qualitatively and the sodium flame test would be reliable for the determination of whether or not a

(Testimony of Thomas Williams.)

suspected sample was contaminated with salt water or fresh water?

A. If the Volhard method was used, its only expression would be in terms of percentage data.

Q. Didn't I understand you to say that you could use the Volhard process qualitatively?

A. If it is used qualitatively——

Q. Would you like that question read back?

A. Yes, please.

(Last question read by reporter.)

A. In my opinion, it is necessary to know quantities of material, both in terms of sodium and chloride, before you can come to such a conclusion. They are present in quantity, yes, but you have got to have a comparison expressed in terms of quantity in order to come to some conclusion.

Q. Are you acquainted with the Barreto process?

A. I am not.

Q. Have you had any occasion to research in the chemical texts or encyclopedias or other chemical authorities to determine what the Barreto procedure consists of?

A. No, sir. [240]

Q. Having in mind that the deposition of Dr. Barreto states that he used the sodium flame test for the determination of sodium content in suspected samples; that he used the Volhard process as well as his own process for determining the presence of chlorides in the suspected samples; having in mind also that Dr. Barreto has testified in his sworn deposition that he tested both

(Testimony of Thomas Williams.)

suspected samples, the samples intentionally contaminated with salt water, and that he also made comparative analyses of samples of good marketable flour and samples that had been damaged in this shipment; having in mind also that Dr. Barreto says that he tested these samples quantitatively as well as qualitatively, would you now care to express an opinion as to the reliability of the conclusion of Dr. Barreto as shown in his report?

Would you like to have the question read back?

A. I believe I understand the essence of your question. My opinion is that competency would necessarily include quantitative data in order to support his conclusion. Presumably, Dr. Barreto has testified that he did conduct quantitative data. My only opinion is, why didn't he report it? In any legitimate report, in my own experience, it is necessary to prove what you have to say, and our only proof in analytical chemistry is by the presentation of quantitative data. That is our only way of proving anything we say. [241]

Q. Assuming that Dr. Barreto did make quantitative as well as qualitative tests and comparative tests on good samples and others, would you then consider that his opinion based on such tests was reliable?

A. I don't think opinion is the necessary—is the thing to go on. You don't have to express an opinion.

Q. May I rephrase the last part of the question

(Testimony of Thomas Williams.)

to say that his findings based on such tests would be reliable? A. Yes.

Mr. Howard: That is all.

Redirect Examination

By Mr. Crutcher:

Q. You stated that the results of a Volhard test used quantitatively are usually expressed in terms of percentage. Does Dr. Barreto's report in front of you indicate that the Volhard test is used?

A. This report before me does not imply that Volhard's method was used, no, sir.

Q. If Dr. Barreto had used quantitative procedures in making the analyses reported in the report before you, wouldn't he have shown the percentages that he found?

Mr. Howard: I object to that question, Your Honor, as calling on this witness to speculate as to what is in the mind of the man who makes the report down in [242] Rio de Janeiro, "Wouldn't he have shown that." That is certainly searching the mind of the person who made the report and is not a proper subject for any expert witness.

Mr. Crutcher: My point is, Your Honor, that the witness has testified that a quantitative result from the Volhard test is expressed in terms of percentages. He has stated that the report does not indicate that the Volhard process was used. My question is, if he did use a quantitative procedure to determine the amount of sodium, is there

(Testimony of Thomas Williams.)

any other way to report a quantitative analysis other than in terms of percentages?

The Court: The objection is overruled.

The Witness: There is no other way of expressing quantitative data, other than by percentage composition.

Mr. Crutcher: That is all.

Recross-Examination

By Mr. Howard:

Q. The Barreto report doesn't show any of the procedures that were used, the Volhard procedure or any other, does it?

A. The presumption when you report—such a report as this is that it is qualitative, which implies the use of qualitative procedures, standard. [243]

Q. My question was that the report as you have it before you, a translation of it, does not show what procedures were used at all, the Volhard or otherwise?

A. Sir, it is an analysis. It must be one of the two, qualitative or quantitative.

Q. I am speaking of procedures.

A. Well, qualitative implies procedures.

Q. Does it show whether a sodium test was made?

A. Yes, sir.

Q. How do you determine that?

A. The fact that it is reported here sodium is present.

(Testimony of Thomas Williams.)

Q. It does not show that the flame test was used for determining sodium, does it?

A. Not necessarily. It could have been one of only two possible procedures that you can use for sodium. The flame test is the only qualitative test for sodium—I beg your pardon, other than rather involved specific reagents which I can say with good probability were not used.

Q. You are not acquainted with the Barreto test procedure?

A. From Barreto's testimony, the reference he refers to is quantitative, by his own testimony.

Q. Quantitative?

A. Yes, he implies that is quantitative.

Q. Are you aware of the fact that the Barreto test is [244] published in two well known volumes of chemical authorities and used in this country?

A. That is what the deposition says.

Q. You have not checked that?

A. No, sir.

Mr. Howard: That is all. [245]

* * *

The Court: You may step down.

(Witness excused.)

JAMES GOW

called as a witness by and on behalf of respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Wakefield:

Q. You are Mr. James Gow?

A. Yes, sir.

Q. A marine cargo surveyor?

A. Yes, sir.

Q. What has been your experience in marine cargo work?

A. I became a marine surveyor in 1922.

Mr. Howard: If the Court please, I am willing to admit the qualifications of Mr. Gow as an expert witness in marine cargo matters in the Northwest area.

Q. In connection with your work as a marine cargo surveyor, have you on frequent occasions dealt with damage to sacks of flour?

A. Yes, sir. [246]

Q. Flour contained in cotton bags?

A. Yes, sir.

Q. Carried aboard ships? A. Yes, sir.

Q. Has that experience included bags of flour that were damaged by water?

A. Yes, sir.

Q. Salt water and fresh water?

A. Yes, sir.

(Testimony of James Gow.)

Q. In this same connection, damaged flour taken off ships, have you had experience in the reconditioning—or the determination, I should say, of the extent of damage sustained by that flour as a result of wetting? A. Yes, sir.

Q. Have you actually had charge of and reconditioned flour that has been wetted?

A. Yes, sir.

Q. Based upon your experience and general knowledge of flour, wetted flour by salt water or fresh water; and assuming that there was a shipment of 10,500 bags of fifty kilo weight, which is 110 pounds, discharged from a vessel at Rio de Janeiro; and that some five to ten days after discharge, upon arrival at the warehouse of the consignee, it is discovered that 3087 bags of this flour have spots of wet and caked flour on the bags, such spots being of varying [247] sizes and on varying locations on the bags—by that I mean the tops, bottoms or the ends—but without any regular pattern as to location or the size of the spots, and that in the spots themselves the penetration of the dampness or the caking extends for a maximum distance of 5 cm.; and on those facts as to that flour and those 3087 bags six sacks are selected at random from the 3087, which six sacks are inspected visually, and the depth of penetration as indicated is determined with respect to some of those six bags and certain samples taken from those six bags, but no segregation of sound and damaged flour is

(Testimony of James Gow.)

made as to those six bags or any other bags of damaged flour: tell me whether in your opinion it is possible for you or any other marine surveyor or anyone else to arrive at an accurate or anywhere near accurate percentage of damage in those damaged bags in that way? A. No.

Mr. Howard: Libelant objects to that question on the basis of the assumption by counsel, which may be based on part of the testimony, but there is other testimony to other extent as to spots of wet and caked flour, and I call counsel's attention particularly to the statement in the sworn deposition of Mr. Ferreira, "The damage varied; some bags were wet on top, others on the bottom or sides, and others completely wetted." [248] I think any assumption should be based upon the evidence in the record, and I think that is evidence that should be included in the hypothetical question.

Q. Let's make the amendment that counsel has just read to my question, that some bags were wet on top, others on the bottom or sides, and others were completely wet; What is your opinion with respect to the possibility of making an estimate of damage, extent of damage to such 3087 bags of flour?

A. I would think the quantity—the number of bags that were examined was six bags?

Q. They examined six bags, yes.

A. I would say the quantity was too small to determine the extent of damage.

(Testimony of James Gow.)

Mr. Howard: Your question was six sacks were selected from the damaged portion. I again call your attention to the testimony of either Dr. Barreto or Mr. Ramos to the effect that 20 bags were examined and six were tested.

Mr. Wakefield: No, there is no such testimony.

The Court: The question may stand in its present form.

Mr. Crutcher: I believe Dr. Barreto testified to an examination of 20 bags on cross-examination, without qualifying himself as the surveyor. [249]

Mr. Howard: Here is the answer I am referring to, "Thirty-five per cent was of the bags I saw in the storehouse. I saw only damaged bags; thirty-five per cent of the flour in the damaged bags was spoiled. I looked at about twenty of the bags taken from the damaged lot and concluded that the percentage of damage was thirty-five per cent."

The Court: You may amend the question accordingly.

Mr. Wakefield: That isn't in accordance with Mr. Ramos' testimony, the surveyor, I have never heard of 20 bags, and I have been on this case for a year now.

The Court: If I had heard it, I confess it had slipped my mind also.

Mr. Crutcher: It is also true in that connection that Dr. Barreto did not qualify himself as a marine surveyor, or have any capacity to estimate damage.

Mr. Wakefield: That is true, Dr. Barreto doesn't

(Testimony of James Gow.)

qualify as a surveyor nor purport to be one. Mr. Ramos is the one who took the samples and selected the six bags at random, and if this man looked at 20, he doesn't say he opened 20. He says, "I looked at about twenty of the bags taken from the damaged lot . . ." and someplace else says something about six.

Mr. Howard: He did previously say he took samples from six bags. He later says he looked at 20 bags. [250]

Q. With that amendment—and I am not admitting that there were 20 bags, but Dr. Barreto, the chemist, said he looked at 20 bags, the surveyor selected 6 bags—I will ask you whether in your opinion it was possible for a surveyor to arrive at a percentage of damage over the 3087 bags on the basis of such an examination?

A. In my opinion, it would not be.

Q. If you had damage to 3087 bags, what in your opinion would be the minimum number of bags you would have to examine to arrive at any conclusion as to damage?

A. In view of the statement made that the damage to these bags was varied, varying in size, varying in the area of the bag, I would say you would have to take about 20 per cent in order to be—and then you might even go beyond that, for the reason that you would have to consider that some bags in a larger area, you would have to make a segregation to come up with how many bags had small areas

(Testimony of James Gow.)

and had large areas. You couldn't just take a few bags and say the rest of them are all like that.

Q. In any survey of damaged flour by water, what would you consider in your opinion to be the very minimum percentage of bags to be examined in order to obtain a fair test or survey?

A. The very minimum?

Q. Yes. [251]

A. I would say 10 per cent.

Q. Reverting back to the hypothetical question which I put to you a moment ago, namely, the 3087 bags with the character of damage detailed, to wit, the spots on the sides and ends and some bags totally submerged, I will ask you whether in your experience in dealing with wetted flour it would be possible for there to have been as much as 35 per cent damage to those bags of flour?

Mr. Howard: I object to that question. This witness cannot testify as to what was possible. He did not see the bags, according to any evidence that is in the case today. He is an expert. He has got to either testify from his own knowledge or else on the basis of assumptions that have not been made yet in the hypothetical question.

Mr. Wakefield: What assumptions?

The Court: I should think you should give him the assumed question, or else the objection is sustained.

Mr. Wakefield: I reverted to the first hypothetical question.

(Testimony of James Gow.)

The Court: Read the question.

(Last question read by reporter.)

The Court: The objection is overruled.

Q. Would you answer that, please?

A. Could I have the question again, please?

(Last question read by reporter.)

A. In my experience, in my opinion in handling flour I would say that was excessive.

Q. Can you tell us how much excessive?

A. Again expressing it as my opinion, and having handled flour which has been totally submerged, I would say that the damage—from what has been told to me to get a picture of this, I would say it wouldn't exceed 10 per cent.

Q. That the damage was what?

A. Wouldn't be over 10 per cent.

Q. Have you had an actual instance of bags totally submerged in salt water aboard a vessel which were later brought out of the vessel and re-conditioned and disposed of? A. Yes, sir.

Q. Which ship is this, by the way?

A. That was a ship called the Djambi.

Q. How many sacks of flour were wetted or totally submerged?

A. There was a large number of sacks, roughly ten or twenty thousand bags of flour in that hold that were wet. The particular lot of flour I handled represented around about 4,000 bags, 3,800 to 4,000 bags.

(Testimony of James Gow.)

Q. Did you actually segregate the damaged flour and sound flour in this Djambi case?

A. Yes, sir. [253]

Q. And you made an actual determination of the percentage of damage in this flour which was totally submerged?

A. Yes, sir.

Q. What were the results?

A. We separated the flour when the flour came out. It had been totally submerged. For that reason, we had entirely wetted bags. It wasn't a question of where you had a portion of the bag wet and a portion dry. We separated all dry bags and put them out. The rest was bags that had been completely under water. They were put in a warehouse and during the period of taking them out of the ship until we could make arrangements for handling, for the segregation, the bags dried out to a certain degree and became coated, and we knew from past experience we had had that the flour below the cake would be perfectly good.

The flour had been detained by the Government until such time as we could submit to them a reconditioning proposal, and on making that reconditioning proposal and method of handling the flour and getting their approval, we took the flour and reconditioned it by removing the damaged portion of the bag, and the caked portion, and recovered all of the good flour.

Q. What percentage of it did you recover?

A. In that particular instance, we recovered—the loss of flour was 5 per cent. [254]

(Testimony of James Gow.)

Q. That is in bags totally submerged in salt water, taken out and reconditioned, you only lost 5 per cent of the flour, is that correct?

A. That's right.

Q. And when you added to the loss of 5 per cent on these totally submerged bags the additional cost of reconditioning and charged that against the loss, how much did that bring?

A. It was less than 10 per cent.

Q. Based upon that, can you conceive of any possible basis from your experience upon which the sacks of flour as were discharged from the Sweepstakes, which I stated in my hypothetical question a moment ago with respect to spots and degree of penetration; can you think of any possible basis on which there could have been damage from water, salt water, to those bags to the extent of 35 per cent?

Mr. Howard: I object to that question, if the Court please, "any possible basis." I think the factors could be shown, and unless counsel presents the witness with some assumed fact on which he can base his answer, it is speculation on the part of the witness.

The Court: I am inclined to think the form of the question is objectionable. The objection is sustained.

Q. Have you ever had experience with damaged flour from salt water, either from spots of water on the sacks or [255] from total submersion in salt water, where the damage ran 35 per cent?

(Testimony of James Gow.)

Mr. Howard: Objected to as repetitious.

The Court: Overruled.

The Witness: No, I don't recall any flour that I ever handled, either spotted or totally submerged, that ran to that percentage of loss of flour.

Q. In your opinion, is it humanly possible for a surveyor or anybody that has had any amount of experience whatsoever to look at a lot of damaged flour, even assuming it has been totally submerged, all of it, in salt water, and state what the percentage of damage is to that flour without actual segregation of sound and damaged flour?

A. Absolutely not.

Q. Will you explain why?

A. Your gluten comes out of flour and seals the bag, makes a cake. Your water penetrates a given distance and your flour on the inside is perfectly good. Until such time as you remove the flour, the good flour out of that bag and can weigh it and determine what your recovery is, I don't see how you can arrive at what is good and bad, until you segregate the good from the bad.

Q. In your work as a cargo surveyor, do you have occasion and is it part of your job to examine the holds of vessels where cargo has been damaged for the purpose of [256] attempting to determine the possible cause of such damage?

A. Yes, sir.

Q. You say it is?

A. Yes, sir.

Q. And in determining the cause of damage, do

(Testimony of James Gow.)

you take into consideration the evidence of the damage on the cargo itself as a factor in arriving at your conclusion?

Mr. Howard: Objected to as leading.

The Court: Yes, it is. It is sustained. You can ask him what he took into consideration.

Q. What do you take into consideration when you are seeking to determine the cause of the damage to cargo, let's say by water?

A. We examine the cargo, to begin with, because that is what gives us the basis of our facts to look for the trouble. We first determine whether it is salt water or fresh water, not to the degree of salt, but we test it to find out whether or not it is salt, and the condition of the bag and the number of bags, and then we look in the ship's hold where the cargo was stored, and from there on we trace back to find the causes or conditions.

If it is fresh water, we look for fresh water conditions; if it is salt water, we look for conditions that would cause salt water damage.

Q. Assuming that a vessel carried 10,500 sacks of [257] flour in its tween decks Nos. 1, 2, 3 and 4, and also the lower tween deck No. 4; that the 10,500 sacks of flour were discharged from the vessel between the 22nd and the 25th of February, 1946; and that on the 2nd of March when the flour arrived at the consignee's warehouse it was found to have been damaged by spots on the bags of varying sizes and at varying places, with some bags totally wet,

(Testimony of James Gow.)

to the extent of 3087 sacks; state whether within your experience there is any possibility, in your opinion, of such damage as I have described having occurred aboard a vessel?

Mr. Howard: One assumption you have made is that the flour arrived at the consignee's warehouse on March 2nd. The only testimony on that that I can find that would have a bearing on it is that the cargo arrived at the consignee's warehouse between February 22 and March 1.

The Court: State your objection to the Court.

Mr. Howard: I object to the question, Your Honor, on the basis that it contains an assumption of fact that is not supported by the record in this cause, and that the testimony as to dates of arrival at the warehouse is as stated in Mr. Herold's deposition, between February 22nd and March 1.

Mr. Wakefield: If the Court please, at this time, in view of counsel's statement, before ruling on the question [258] I wish to offer in evidence the respondent's interrogatory No. 4 propounded to the libelant, which interrogatory No. 4 is as follows: "State the date when the cargo in question was received at the premises of the Libelant or its agent or representative or consignee."

The answer, served on me on March 10, 1948, a year and a half ago, "Interrogatory No. 4. March 2, 1946."

I offer that in evidence.

Mr. Howard: Your Honor, that wasn't in evi-

(Testimony of James Gow.)

dence at the time this question was propounded to this witness, and it is an answer to an interrogatory that was made on the basis of information that was available a year and a half ago, when the answers to the interrogatories were prepared. We have the testimony in the record of the checker who supervised admission of the flour to the consignee's warehouse, and it shows delivery of the flour between February 22 and March 1.

The Court: Who made the answer to the interrogatory?

Mr. Howard: Bigham, Englar, Jones & Houston and Merritt, Summers & Bucey, verified by Charles B. Howard, ". . . that affiant has been furnished with data upon which the foregoing replies to interrogatories have been prepared; that affiant has read said answers and believes [259] the answers to be true."

The Court: Does the Court have to take some other evidence, other than that answer, as to the fact, other than the answer made by you?

Mr. Howard: I submit the best evidence is the evidence in the record of the checker. It has not been controverted by anything respondent has brought in. He states the dates as between February 22 and March 1 for receipt at consignee's warehouse.

The Court: It seems to me the Court has no right to exclude the conditions stated by the interrogator, in view of that record.

(Testimony of James Gow.)

Mr. Howard: Your Honor, counsel has now offered that answer to the interrogatory in evidence. That was not in evidence at the time the question was propounded to the witness, and the only evidence we had in the record was this sworn testimony right here.

If counsel wants to offer that answer to the interrogatory in evidence, then we have two different dates. We have one date in the answer to the interrogatory of March 2, and we have this one of February 22-March 1, and I submit this is the best evidence, in the sworn testimony of the man who was there.

The Court: Do you wish to offer the interrogatory and the answer thereto in evidence? [260]

Mr. Wakefield: Yes, Your Honor.

The Court: It is admitted in evidence.

Mr. Wakefield: May I also say that counsel knows very well that the surveyor Ramos testified it was March 2. It was March 2 all through this testimony until a few days ago when this last deposition arrived.

Read the last question, please.

(Last question read by reporter.)

Mr. Howard: I renew my objection, for the purpose of the record. I do not believe the Court has actually passed on the objection.

The Court: Overruled. You may answer.

A. From the description of the damage to the bags, in my opinion, the water getting into the ship

(Testimony of James Gow.)

would not give the condition that these bags appeared in. In other words where a ship has a leaky rivet, and a deck rivet, or a leak in the plate, you get a concentrated water, a water flow to the scuppers. If the scuppers should be clogged, you will get an accumulation of water where it will wet a number of bags, and you get a number of bags above that area that will become wet by absorption. You do not get a sprinkling effect, where it has been described in this information as given that the bags are spotted to various degrees. You don't get that. You get that more from a sprinkling condition, rather than an actual condition of water coming from [261] above or the side of a vessel. If it comes from above, there would be an area of concentrated wetting.

The Court: It would not come from salt spray, from salt water coming aboard a ship?

The Witness: I can't say, Your Honor, how it would get there and cover the number of bags. It could cover a small number of bags right under a ventilator, but there is no chance of its spreading out over a large area and affecting the number of bags that are represented here.

Q. In addition to the assumptions of fact that I gave you in the hypothetical question just expressed, I will ask you to further assume, if you will, please, that this vessel in question had no cowl ventilators, that the ventilators were a forced system with both the intake and exhaust on top of the

(Testimony of James Gow.)

king posts, and with no ventilators on deck; and further, that the deck hatch covers were steel pontoons of the type with which you are familiar, I am sure, each covered with three tarpaulins: I will ask you whether, assuming those additional facts, there is any manner in your opinion and within your experience in which this cargo could have been damaged in the way it was damaged aboard ship?

A. Not to the condition described here, of scattered areas.

Mr. Wakefield: That is all. [262]

Cross-Examination

By Mr. Howard:

Q. Earlier in your examination reference was made to the possibility of there being 35 per cent damage to bags of flour by wetting. In your answers to these questions, have you been assuming that 35 per cent damage referred to quantity in the bag, 35 per cent of the total quantity in the bag?

A. I assumed it meant there was 35 per cent of the flour was damaged.

Q. Actually 35 per cent by weight was damaged?

A. Let me stop and think. I mean this way, that the assessment of damage—that the flour was damaged 35 per cent.

Q. Well, I have two answers from you. Now I would like to get this straight, do you mean 35 per cent damage by weight of flour in the bag?

A. Yes, I mean——

(Testimony of James Gow.)

Q. That is the assumption you were making?

A. Yes, 35 per cent of the flour was damaged.

Q. By weight? A. Yes.

Q. You are called upon many times to make a survey to determine the percentage of damage to a commodity such as flour on water shipments?

A. That's right.

Q. Is it not a fact that one thing that you [263] would consider, in addition to the actual quantity by weight or measure of the damage, would be the cost of reconditioning that commodity?

A. Yes.

Q. That would include labor and material necessary to recondition? A. Yes.

Q. And that would have to be calculated in determining the extent of damage? A. Yes.

Q. Isn't it a fact that in a commodity such as flour, would would also have to consider whether that flour that wasn't actually caked or wetted was damaged by tainting or smell?

A. Yes, that is possible. However, from my experience in handling flour, I have actually had flour where flour has been moulded on the bags before you could get to the point of removing the flour, that the bags have actually been moulded, and we have removed the top of the bag and taken the good flour out and have never found it tainted, and it has passed rigid Government inspections.

Q. It is a factor you have to consider, whether the contamination has affected it by taint or smell?

(Testimony of James Gow.)

A. We do consider it.

Mr. Wakefield: There is no evidence of that in [264] this case at all. I think it is improper cross-examination.

The Court: Overruled.

Q. Another factor that you would consider would be the mould or any fungus growth on the flour, wouldn't it? A. Yes.

Q. Wouldn't it be true that the increased moisture content in the flour that wasn't actually caked would have a bearing on your appraisal of the value of that flour that wasn't actually caked?

A. No, because in reconditioning the flour, the flour that cakes has absorbed the moisture. That remains as a hard cake on the bag. When you withdraw the flour from the bag that is free-running flour, it is just as good as the day it was made. I proved that in Tacoma in the Djambi case. After we cut the top off that bag and lifted it up very carefully so we wouldn't get any of the cake portion or mould in it, put that off to the side, turned the bags out and dumped the flour into a hopper that went down through a pipe into the bin, that flour was tested by chemists, tested by the state. I had my own chemists and we took sealed samples. The state tested it, I couldn't touch that flour until the state gave me permission. The state found nothing wrong with it. The flour was re-bagged, reshipped and sent to the consignee as a sound product. [265]

(Testimony of James Gow.)

Q. You would say there would be no increased moisture content, would not affect it?

A. It would not affect it.

Q. Isn't it a fact that in addition to the actual quantity by weight or measure of damage in a sack of flour, another factor that would have to be considered in determining the extent of damage would be the effect of damage on the market value of the product as a reconditioned product?

A. No, not in the case of flour, where the flour was handled by a reputable mill. That flour is either good or it isn't good. If it wasn't good and was proved not good, you couldn't sell it as flour. In this country, you couldn't sell it as good flour.

Q. In certain cases you might find it would be condemned so that it could not be used for human consumption?

A. If it had particles of mould, the Government won't release it. You can't even use it for animal food without special permission.

Q. Isn't that a condition that might exist in flour damaged by salt or fresh water?

A. I don't think so, because all damage adheres to the caked portion, not to the interior of the bag.

Q. You say that would have no effect on the market value, the fact that it was reconditioned flour?

A. No, sir, because in taking good flour and putting [266] it in new containers, you are leaving the damaged flour behind.

(Testimony of James Gow.)

Q. How do you test a shipment of flour, such as on the Djambi, for extent of penetration of wetness?

A. We would take a number of bags. First of all, the Djambi case, taking that, which is a very good example, that flour is entirely submerged. Therefore, we knew that all of the flour was wet. We also knew that it was mouldy. We knew we had a problem there. We would go into the bag and take out from the center of the flour, a sample, and we determined that the flour was free-running, it was good, and we would have that analyzed.

Then you go up underneath the skin of the bag. The skin of the bag is where it has a certain amount of cake, and you go underneath on the skin of the bag, draw your sample from there. You can tell when you hit the cake portion because it is the hard portion. You take your sample from there, analyze that. What we did was take samples from a number of bags and submit it to chemists and have it analyzed, and on their findings, whether they had good or bad flour, was whether we would proceed further to spend the money for reconditioning or not.

Q. In some of this flour such as you have mentioned as damaged by wetness of one kind or another, as I understand it, it may not even be fit for livestock consumption? [267]

A. That is a Government ruling, that it isn't fit for livestock, but the Government doesn't mean

(Testimony of James Gow.)

that it isn't fit for livestock. It can be used for livestock, but the Government doesn't have the force to police it, and some of that flour may get out for human consumption, which they rule against.

Q. Are you familiar with the regulations in Brazil, particularly the Port of Rio de Janeiro, as to reconditioning of flour and whether flour that has been damaged may be sold on the market for either human consumption or livestock consumption?

A. No, I am not.

Mr. Howard: That is all.

Redirect Examination

By Mr. Wakefield:

Q. On this question of 35 per cent which counsel asked about, I would like to be sure that we and counsel and the Court all understand your testimony. The testimony in this case by the surveyor, Mr. Ramos, who testified for the libelant was to the effect that with respect to these 3087 bags of damaged flour, which I have detailed to you in previous hypothetical questions, that he selected six sacks at random which he opened and looked at and measured the depth of penetration of the moisture in the spots, and he [268] said that the maximum was 5 cm. or 1.9 inches, and based upon that examination of six sacks, he has testified that in his opinion the 3087 bags were damaged to the extent of 35 per cent. Now, my first question to you is whether in your opinion it is possible to make any such

(Testimony of James Gow.)

estimate of damage on that kind of examination?

Mr. Howard: Objected to as repetitious, Your Honor.

The Court: It is sustained.

Mr. Wakefield: It may be repetitious, but it is clearing up what counsel got improperly on cross-examination.

He asked Mr. Gow on cross-examination if he meant 35 per cent of the weight of the damaged flour in the bags and that is what I am trying to clear up. I think this is proper redirect examination, Your Honor.

The Court: You may ask him this further question. Afterwards, I think the interrogation of the witness should be suspended here unless there is some specific thing mentioned before. The Court will withdraw the ruling, and the objection is overruled. You may answer this question.

Q. Read the question, please.

(Last question read by reporter.)

A. In my opinion, it is not.

The Court: What else do you think you should inquire on redirect examination, if anything? [269]

Mr. Wakefield: I was going to ask him, in order to illustrate what Mr. Howard asked in cross-examination, what the loss in weight or quantity of flour in the Djambi case was. With respect to bags totally submerged, what percentage of actual flour did you lose?

(Testimony of James Gow.)

The Witness: We lost 5 per cent.

Mr. Howard: That was the subject gone into on direct examination. Counsel had a chance to——

The Court: The objection is sustained. The witness' answer of 5 per cent will be stricken and the Court will disregard it.

Mr. Wakefield: That is all.

Mr. Howard: That is all.

The Court: You may step down.

(Witness excused.)

The Court: Call your next witness.

Mr. Wakefield: I have two more depositions. One is long and one is short.

The Court: Court will be adjourned until tomorrow morning. Those connected with this case are excused until 10:00 o'clock. Court will be adjourned until tomorrow morning at 9:30.

(At 5:45 o'clock p.m., Tuesday, November 1, 1949, proceedings adjourned until 10:00 o'clock a.m., Wednesday, November 2, 1949.) [270]

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The Court: You may proceed in the case on trial. [271]

* * *

Mr. Wakefield: That is correct, Your Honor. The respondent would next like to call the witness Percy Punnett, a chemist from Pease Laboratories in New York, and read his deposition at this time.

DEPOSITION OF PERCY W. PUNNETT

Direct Examination

“By Mr. Lord:

Q. Will you give us some of your academic attainments, Dr. Punnett?

A. I graduated from the University of Rochester in 1911, receiving the Bachelor of Science Degree in Chemistry, and for four years after that I did graduate work at Columbia University in the Department of Chemistry, particularly in food chemistry, receiving a Master's Degree in 1912 and a doctor's degree—Doctor of Philosophy—in 1915.

Q. These two degrees were at Columbia University?

A. Both at Columbia University.

Q. What is your present profession?

A. At present I am a consulting chemist, or chemical consultant, whichever way you choose to put it, associated with a firm of chemical consultants, the Pease Laboratories [273] at 39 West 38th Street, New York City.

Q. What has your experience as a chemist consisted of?

A. I have had some thirty-four years of experience in various fields of chemistry, including being in charge of control laboratories in various plants, in research work in various products, including several food products, and for nineteen years have been a chemical director of Good House-keeping magazine, doing and supervising the analy-

(Deposition of Percy W. Punnett.)

sis and testing of foods, cosmetics and so on—a wide variety of drugs, some four or five thousand drugs a year. Since 1947 I have been in consulting work, chiefly on food products, things like tea, coffee, bakery products, flours and so on. I am chief chemist of Pease Laboratories and supervising the analysis and testing of all sorts of products, including food, water supplies and so forth.

Q. Will you give us some idea of the number of times that you have made analyses of wheat flour?

A. I have no exact record of the number of samples that I have analyzed, but certainly it would be over fifty and perhaps a hundred such samples.

Q. Have you ever had occasion to make analyses of water?

A. Yes, I have at various times analyzed various types of water, and one of my present duties is to supervise analyses of household waters, industrial waters, waste products of various kinds, from samples coming from private [274] individuals or engineering firms or industrial firms, in connection with this Pease Laboratories, in interpretation of the results and giving of advice to the clients.

Q. What academic or professional societies, if any, have you associated with?

A. I have been a member of the American Chemical Society for over twenty-five years, and am a member of the American Association for the Advancement of Science, and I am a member of certain honorary societies, such as Phi Beta Kappa,

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Sigma Xi, an honorary scientific society, and Phi Lambda Epsilon Society, an honorary chemical society.

Q. Are you familiar with a process or method known as the Volhard Process or method?

A. Yes, I am.

Q. Will you explain that process for us, please?

A. The process is one ordinarily used for the quantitative determination of chlorides. It involves the use of a solution or extract of whatever product is being tested which contains the chlorides.

Q. What is the first step in preparing such a product for analysis?

A. The first step, of course, is to obtain a sample—representative sample of the product. The next step is to weigh out a portion of such a sample and to destroy or remove organic material, if present, which it would be in a [275] food product.

Q. What is the method you use to remove these other properties?

A. The weighed sample is usually incinerated or ashed at a controlled temperature, usually not exceeding 450 degrees centigrade. The mineral matter or ash that is obtained is then taken in solution, generally by the addition of a mineral acid—in the case of chloride the acid would be, of course, such an acid as sulphuric or nitric. The solution thus obtained, which may be filtered, of course, to remove any insoluble particles, is then subjected to the Volhard Process for the determination of the amount

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of chloride present. This process involves the addition of a measured quantity of silver nitrate in solution, the removal of the precipitated silver chloride by filtration and the determination of the excess silver in the filtrate by the addition of what is known as an indicator material—in this case it is ferric sulphate—and the addition of a sufficient amount of a thiocyanate solution of a known strength. When sufficient has been added, a color change takes place, and by the measurement of the amount of thiocyanate solution added, the amount of silver left in the solution can be calculated, and from that the amount of silver used up in precipitating the chloride originally, and, of course, then the amount of chlorite present in the original sample of the [276] product being analyzed.

Q. Is that residue amount subject to precise determination?

A. The method is quite precise. No chemical method is, of course, absolutely precise, but it is accepted as an excellent and sufficiently precise method for any determination of chloride. The amount of sample that will be used in such a determination will, of course, depend upon the amount of chloride expected in the sample, but the method probably is accurate to one part in .001 of chloride.

Q. Is it customary in making an analysis by the Volhard method to show the percentages of chlorides found as the result thereof?"

Mr. Howard: I object to that question, if it was

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customary. The witness has not indicated whether he is familiar with what is customary at the Port of Rio de Janeiro, Brazil, and that is the issue in this case. The shipment arrived at Rio de Janeiro, and that is the point where the custom, if any, would have a bearing on this case, and unless the witness qualifies his answer or his experience to show that he is familiar with that custom, I submit it is inappropriate.

The Court: As I understand it, this deposition was taken upon oral interrogatories propounded to the witness [277] of the time his deposition was taken?

Mr. Wakefield: Yes, Your Honor.

The Court: Was each side represented at the taking?

Mr. Wakefield: Yes, Your Honor.

The Court: The objection is overruled.

"A. Yes.

Q. Doctor, is there a standard method of determining the presence of sodium in wheat flour?

A. Yes.

Q. What is that method?

A. For the demonstration of the presence of sodium, a sample of the flour—which in this case may or may not be accurately weighed—is ashed, following the approximate method I previously described. The ash is dissolved, and a few drops of the ash solution is heated in a flame—Bunsen flame—on a clean platinum wire. The presence of sodium is

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unmistakably demonstrated by the appearance of a bright yellow color in the flame. This color can be furthermore identified by the use of a simple hand spectroscope, since the color produces spectro-lights of a definite wave length.

Q. If the spectroscope is not used, would you call the test a qualitative or quantitative analysis? [278]

A. As ordinarily carried out, the flame test for sodium is a qualitative method and qualitative test.

Q. Will you explain for us the difference between a qualitative and quantitative test?

A. The qualitative test, of whatever character, merely determines whether or not an element or a compound is or is not present in the sample under examination. The quantitative test is for the purpose of determining what percentage of that element or compound is present in the sample.

Q. When a quantitative test for sodium has been made, is it customary to state the actual percentage of sodium which is found as the result thereof?"

Mr. Howard: Same objection, without belaboring it, as to the custom.

The Court: The objection is overruled.

"A. Yes, it is.

Q. Are you familiar, or have you heard of a test known as the Barreto method?

A. I have recently looked up the method. Very brief descriptions of the method are published in

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two well-known books on chemical analysis, but the descriptions are very brief and somewhat contradictory. I believe that the original method was published in a Brazilian chemical [279] magazine written in Portuguese. This magazine apparently is only available in four or five libraries in the United States, some of which are in Washington, D. C. I have not attempted to obtain copies of the original method. The Barreto method, for the determination of sodium, is not in common use in this country. There are methods that are much more commonly used.

Q. The Barreto method, when used, would be a quantitative analysis, would it not?

A. That, I believe, is the claim of Dr. Barreto in his article. At any rate, the title of the article, I believe, indicates that this is a quantitative method for the determination of sodium, and these abbreviated descriptions that I have read so state.

Q. If the Barreto method were a successful quantitative method, would it or would it not necessarily enable the analyst to determine the percentage of sodium found in the ash?

* * *

A. If the method is a successful and accurate method, I believe that it would enable one to determine the percentage of sodium in the ash of a food product."

Mr. Wakefield: At this point counsel offers a translation of Dr. Barreto's report, such as is

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in [280] evidence in this case as Exhibit 4, there is no objection, and it is marked Respondent's Exhibit AA for Identification. That is the same document as Libelant's Exhibit 4 in this case.

The Court: Do you agree, Mr. Howard, to the last statement of Mr. Wakefield?

Mr. Howard: Yes, Your Honor, and New York counsel agreed that under the circumstances the request for copying the exhibit into the record would be withdrawn, as the translation was accepted, and we have a translation now in evidence as Libelant's Exhibit 4.

The Court: The Court is so advised. You may proceed.

“* * *

Q. Doctor, I show you Respondent's Exhibit AA for identification, and ask you if you will examine it.

(Witness does as requested.)

Mr. Lord: For convenience, I should like to refer to Respondent's Exhibit AA for identification as the “Barreto report,” is that satisfactory?

Mr. Prem: That is quite all right.

Q. Have you examined the Barreto report?

A. I have.

Q. Doctor, are you able to form an opinion as to [281] whether or not any of the data shown in the Barreto report justifies the conclusion set forth therein?

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Mr. Prem: I object to the question on the ground that what the witness has before him is a conclusion of Dr. Barreto's, and that a more complete basis upon which Dr. Barreto found his conclusion is set out in the testimony of that witness under the commission returned from Rio de Janeiro, and I suggest that the witness be asked to read the testimony of Dr. Barreto in connection with the exhibit he now has before him, as that exhibit is a part of the record of the testimony given by Dr. Barreto in this action. The statement of Dr. Barreto now before the witness is not complete, and I think that the witness should be asked to read that in connection with the testimony heretofore given by Dr. Barreto."

Mr. Howard: Same objection to this question as stated yesterday to similar questions put to other witnesses, without laboring it, that it calls for the opinion of one expert on the opinion of another witness, which I submit is within the province of the trier of the fact.

Mr. Crutcher: May it please the Court, on that question the rule that an opinion of an expert may not [282] be based upon the opinion of an expert means that he may not take as a predicate for his opinion the opinion given by some other expert in the case. There is a lot of material in an annotation in ALR which I have if Your Honor desires it.

The Court: Was there any cross-examination on this point, do you recall?

Mr. Howard: Yes, there was, Your Honor.

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Since it was gone into on direct examination and objections were reserved, we obviously had to cross-examine to protect ourselves.

Mr. Crutcher: The issue here is whether from the data set forth, the objective data in the report, the conclusions stated therein are justified. It is not asking for any opinion of Mr. Punnett based upon an opinion expressed by Dr. Barreto. Furthermore, it is not asking for the results of his investigation, it is simply based upon the objective evidence which is before the Court.

The Court: Considering the way this has arisen, and considering the further fact that counsel had an opportunity of cross-examining this witness, I am going to overrule this objection. It is so ordered.

“A. I am. [293]

Q. Are you able to form your opinion with reasonable certainty? A. Yes.

Q. What is your opinion?”

Mr. Howard: Same objection, Your Honor.

The Court: Overruled.

“A. My opinion is that the data in this report is purely qualitative and shows the presence, in the wheat flour mentioned in the report, of substances that are normally present in wheat flour. It does not give any quantitative data as to how much of these substances are present, hence this data is quite inadequate on which to base the conclusion given in the report by Dr. Barreto.

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Q. What are the properties or substances in which you would expect to have increases shown as the result of analysis, in the event that there was a salt water mixture with wheat flour?

A. I would expect that the flour wetted by salt water—sea water—would show marked increases in the amount of sodium and of chloride present. In those two elements the change would be most marked. There would be other changes but of minor character.

Q. Have you any opinion, Doctor, as to how pronounced [284] in terms of percentages, such change need be in order to suggest salt water contamination?

A. Yes, I have.

Q. What is your opinion?

A. My opinion is that since sodium and chloride are normally present in wheat flour—the sodium to the extent of .01 percent to .04 percent and the chloride to the extent of .1 to .4 percent—for an analysis to make it certain that the flour had been wetted with sea water, the percentages quoted would have to be more than three times the above figures. This opinion is based upon the amounts of sodium and chloride normally present in sea water, and the normal amounts of the same elements that might be present in other types of water. Sea water contains 1. to 1.2 percent sodium and 1.8 to 2.1 percent chloride. These amounts are considerably greater than the amounts that are found in such a material as fresh water, where the chloride may vary from

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.001 percent to .05 percent. The sodium would be somewhat less than these figures.

Q. Is it customary to find some chloride and some sodium in bags containing wheat flour?

A. I would expect to find some small amount in bagging material. Since sodium chloride is an extremely common material that is present in a large number of substances, it may be present in the bagging material. [285]

Q. Doctor, you have testified from an examination of the Barreto report, that in your opinion the conclusion reached by Dr. Barreto is not justified by the data contained in the report. Would your opinion be changed if, in addition to the data shown in the Barreto report, you were advised that Dr. Barreto explained that the word "presence," as used in the report, meant too much chloride and too much sodium?

Mr. Prem: "Too much" in relation to what?"

Mr. Howard: Same objection to this question and the two following questions, through the middle of page 16, as heretofore stated.

The Court: Is the principle any different, Mr. Howard, than that which applied to the preceding objection as to which the Court has announced the ruling?

Mr. Howard: I conceive there would be no difference in principle.

The Court: The objection is overruled.

"A. No, my opinion would not be changed.

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Q. Why is that?

A. Because the quantitative data is necessary in order to form an opinion as to whether the flour had been [286] wetted by sea water. Other types of contamination might increase the sodium and chloride present in the flour, and the conclusion as to sea water being the cause of the contamination would rest upon the quantities of sodium and chloride found in the flour alleged to be damaged, in comparison with the amounts of such elements found in the same lot of flour in the portions that had not been damaged.

Q. Would your opinion, as expressed heretofore about the Barreto report, be changed, if, in addition to the data shown in the report and the foregoing explanation by Dr. Barreto as to the meaning of the word "presence" used in the report, you were advised that the Volhard Process was used to determine the presence of chloride, and the flame test and the Barreto method used to determine the presence of sodium?

A. No, my opinion would not be changed.

Q. Is it possible to use the Volhard method or process and the flame test and such a test as the Barreto method qualitatively?

A. Yes, it is.

Q. In such case what would the result of such analyses be?

A. The result would be in this case a qualitative one merely recording the presence or absence

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of such elements in the flour but would not give the amounts present. [287]

Q. Dr. Punnett, is there a standard method of sampling bags of wheat flour prior to making analyses thereof?"

Mr. Howard: I object to this question on the ground and for the reason that unless the witness shows knowledge that standard method is recognized in Brazil and followed as a custom in Brazil, the witness is not qualified to answer and his answer would not be competent in the issue involved in this case; and further, that there is no proof of a usage to that effect in the Port of Rio de Janeiro, Brazil.

The Court: The objection is overruled.

"A. Yes, there is.

Q. What is that method?

A. The method which is generally accepted is to take samples from the bags in the following manner: Samples are taken from a number of bags approximately equal to the square root of the total number of bags, with the provision that not less than ten bags be sampled. For instance, if 2500 bags were to be examined, samples would be taken from 50 bags. These samples are to be taken in a specified manner, using a sampling tube—a metal tube—approximately of half an inch internal diameter, and of such a construction [288] that it can be forced through the bag into the flour, and a portion of the flour along the length of the tube

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obtained and the tube withdrawn. The standard method requires that the sampling tube be passed in at one of the upper corners of the bag diagonally towards the center of the bag and reaching the center of the bag. After the flour in this tube is removed and emptied into a container, another sample is taken from the other upper corner of the bag in a diagonal direction but reaching only half-way to the center of the bag. These portions of flour that are withdrawn from the bag are then immediately placed in tight containers of such a nature that there can be no loss of moisture from the flour. A separate container is used for each bag sampled. These containers are kept sealed, and before withdrawing a portion for any type of analysis, the contents of the container are mixed thoroughly.

Q. How generally would you say that that sampling method is accepted?

A. That method is accepted by the Association of Official Agricultural Chemists, and is printed in their book which is entitled "Official and Tentative Methods of Analysis of the Association." The same method is accepted by the American Association of Cereal Chemists and printed in their book of methods which is entitled "Cereal Laboratory Methods," published in 1947. The methods endorsed by these two [289] societies are accepted almost universally by chemists who are engaged in food analysis or cereal analysis.

Q. Are you able to form an opinion as to the

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reliability, for purposes of analysis, for determination of condition throughout a shipment of approximately 3000 bags, where samples had been taken from six bags?"

Mr. Howard: I object to that question on substantially the same grounds previously stated, asking the witness to form an opinion on the basis of the methods used by another expert, another chemist.

The Court: The objection is overruled.

"A. Yes, I am able to.

Q. What is your opinion?"

Mr. Howard: Same objection.

The Court: Overruled.

"A. My opinion is that the sampling of six bags out of some 3000 would be most inadequate.

Q. In accordance with the standard sampling method that you have just outlined, what would be the proper number of bags to sample from in a shipment of that size? [290]

A. It would be somewhere between 50 and 60 bags.

Q. You testified, Doctor, that the samples are kept in sealed tins or containers. What is the purpose of sealing the containers?

A. One purpose is, as I mentioned, to prevent the loss of moisture in the samples. Another purpose, of course, is to prevent any contamination of the samples while they are in transit or in the laboratory.

Q. Are there any circumstances under which an

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analyst might have additional reasons for retaining samples? A. Yes, there are.

Q. What are those circumstances?

A. If there were any question as to the composition of the flour being sampled, or any prospect or expectancy of litigation in the matter, such samples would be preserved very carefully, and sealed possibly even with some sort of a special seal that could be identified. They would also be retained for at least as long as the question remained unsettled. Another purpose for retaining these samples in this manner would be to be able to furnish portions of such samples to other interested parties in the matter, as is customarily done.”

The Court: At this time we will have about a ten-minute recess. [291]

(Recess.)

The Court: You may resume the trial proceedings.

Mr. Wakefield: If the Court please, at this time I would like to hand Your Honor the additional memorandum I spoke of.

The Court: You may do that. Let it be filed.

“Q. Is there any custom in your profession of consulting chemist, relative to records of quantitative analyses?”

Mr. Howard: I object to that question as to the custom in the United States. This man has not testified he is familiar with the custom in Brazil.

The Court: If the answer is admitted to be con-

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finer to the United States, the objection would seem to the Court to be tenable and well founded. What is your response, if any?

Mr. Wakefield: If the Court please, I think this is the same question we had up before. This witness and Mr. Williams have both testified that the proper procedures, custom and practice of doing these tests are universal, international.

The Court: Do you show that this is universal by this witness? [292]

Mr. Wakefield: He has so testified.

The Court: I think that if the question does not stand on its own legs—I am not entirely satisfied about this question standing on its own legs in that respect. That is the difficulty I am having with it.

Mr. Howard: I call Your Honor's attention to page 18, where the witness did testify to certain methods being universal, but that applied to sampling methods. We are now on another subject, the records of quantitative analyses, no indication that that is universal.

Mr. Wakefield: Both this witness and Mr. Williams yesterday have testified clearly that these practices are followed by chemists.

The Court: Where did this witness testify that the thing you are now asking about was something that was universal?

Mr. Crutcher: I may enlighten the Court on that. Mr. Williams admitted he had no knowledge,

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Your Honor, whether the practice as to records was universal. His knowledge was confined to well-regulated laboratories in the United States, and Your Honor ruled that accordingly he could not testify as to the practice of professional chemists in keeping records and samples.

Mr. Howard: That would seem to be grounds for sustaining the objection, Your Honor.

Mr. Wakefield: If the Court please, my position is simply this: that we are dealing here with a chemist's report in which he has testified—Dr. Barreto, produced by the libelant, has testified—that he used the Volhard method. That is a standard and international method, and this witness has testified about the Volhard method, and that the Volhard method is a quantitative analysis. Both men are talking about the same thing, and this witness is now being asked as to what is the custom in the chemical profession for retaining records on quantitative analyses. That is what we are talking about.

The Court: The objection here, in the way it has arisen, concerning the subject matter here involved, is sustained. Pass on to another subject. I see another subject mentioned in the question near the top of page 21.

Mr. Wakefield: I would like to ask the question at the bottom of page 20.

The Court: You may do that, subject to whatever objection, if any, may be stated.

“Q. What is your practice, as a consulting chem-

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ist, with respect to showing percentages in reports of [294] quantitative analyses?"

Mr. Howard: I object to that question, since it appears that this witness has practiced in New York for many years. It is not shown that he is acquainted with the practice in Brazil, and further, on the ground it will appear from the answer his answer is not responsive. He doesn't state what his practice is; he attempts to state a general practice. For all of those reasons, I submit that question and the answer to that question should not be considered by the Court.

The Court: Will counsel inquiring consider the form of the answer and see what you have to say?

Mr. Wakefield: Yes, Your Honor. This is certainly admissible. We are testing the ability of Dr. Barreto and his tests, and here is an outstanding chemist, who is being asked as to what his practice is.

The Court: Note his answer.

Mr. Wakefield: I see his answer. That is what he is testifying to.

The Court: The objection is sustained.

Mr. Wakefield: If the Court please, can't an outstanding chemist of the United States testify to what the general practice is?

The Court: He might possibly on proper [295] interrogation, but the question and answer do not coincide. The objection is sustained, and the ruling concerning it will stand. Pass on to something else.

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Mr. Wakefield: Note an exception to the Court's ruling.

The Court: Allowed. [296]

* * *

Q. Dr. Punnett, have you any present plans to go to Seattle, Washington?

A. No, I have not."

Mr. Howard: Before proceeding with the cross-examination, I would like to advise the Court that I will of necessity in view of the Court's ruling as to admissibility and propriety of certain questions on direct examination have to propound certain questions to this witness on cross-examination which develop the same points, but I do so without waiving the objections I have heretofore made to such testimony on direct examination.

The Court: Let the record show that. [300]

"Cross-Examination

By Mr. Prem:

Q. I assume, Doctor, that you have not been afforded the opportunity of reading the testimony of Dr. Barreto given under commission in Rio de Janeiro?

A. Yes, I have had the opportunity.

Q. Then when you testified on direct examination, you knew then that Dr. Barreto was a man of outstanding qualifications as a chemist, both educational and by experience, and also that he had made tests, not only of the damaged portions of this

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shipment but also the sound portions, and on the basis of those tests he had arrived at the conclusion that the damaged portions had too much sodium chloride in as distinguished from the sound portions, so that he was in a position to determine whether or not they had been in contact with salt water. Did you know that when you read the testimony?"

Mr. Wakefield: I want to object to that as improper cross-examination in that it states a hypothetical state of facts which is not in accordance with the evidence. Dr. Barreto did not examine the undamaged flour in this shipment, and I invite counsel to point out any place where the testimony so states that he examined any undamaged flour of this same shipment. He said specifically he did not.

Mr. Howard: In the fifth cross-interrogatory to Dr. Barreto, "Did you make a quantitative examination of both the damaged and undamaged flour?" the witness' answer was, "Yes."

Mr. Wakefield: Either there or on cross-examination, he said that he bought some other flour, but not this flour.

The Court: The objection is overruled.

"A. I was not familiar with Dr. Barreto's professional career, except insofar as he made statements in that deposition. I assume that the statements are correct.

Q. Let's assume that they are true: Would you say that he was a chemist of outstanding qualifications?

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A. I would say that he was a qualified chemist.

Q. Starting with that assumption, and then having knowledge of the fact that he made these tests—and I invite your attention to the fact that he testified he made tests of four types, one by a flame, another by silver nitrate, a third by the Volhard Process, and a fourth by his own process for sodium contamination—which, as he pointed out, was published in two books, one by Welcher and the other by Mellen—would you not say that because of Dr. Barreto's qualifications as a chemist, he would be in position readily to determine whether the samples that he [302] had taken from the damaged bags which were caked, as you will recall from the testimony, had been in contact with salt water, as distinguished from those samples which he had obtained from the sound bags?

A. My memory of the deposition of Dr. Barreto may be a little at fault—I would like to read the portion where he stated that he had sampled sound bags in this particular lot of flour and analyzed these sound samples, just to refresh my memory.

Q. Answering your inquiry, Doctor, I invite your attention to cross-interrogatory 6, which is this: "If you did make a quantitative examination, please give the comparison of the results obtained between the damaged and undamaged flour.

A. I found that there was more sodium chloride in the damaged than in the undamaged flour." Now, the question is whether or not, based on all that,

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his qualifications and the four tests he made, and the fact that he sampled the sound flour and sampled the damaged flour, would he, from that background, be in a position to determine whether the caked flour was damaged by salt water and the other samples uncaked not damaged by salt water?

A. If Dr. Barreto made quantitative analyses indicated by his statement, on portions of the damaged flour and on portions of undamaged flour from the lot of [303] flour in litigation or in question, he should have been able to decide whether or not the damage was due to salt water.

Q. Making tests to determine whether a particular sample of flour has or has not been in contact with salt water is a comparatively easy test for a qualified chemist, isn't that true?

A. That is perfectly true.

Q. Nothing involved or complicated in the matter?

A. Nothing unusual or complicated.

Q. A flame test, silver nitrate test, as well as the Volhard Process, are tests which are commonly practiced by chemists, isn't that true, in relation to ascertaining sodium chloride content of foodstuffs, particularly wheat flour?

A. The flame test and the silver nitrate test are used for the qualitative determination of the presence of the elements included in sodium chloride. The Volhard test and such a determination as the Barreto methods are supposed to be, are quantita-

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tive methods for the determination of sodium chloride. We calculate sodium chloride from the amounts of sodium and chloride found.

Q. A flame test will determine whether or not there has been sea water contact with flour, I take it.

A. Only when that flame test is conducted under more [304] definite and elaborate conditions, and when, in making the test, a definite instrument, such as a spectroscope or spectrometer is used to measure the quantity of sodium present. These instruments are very expensive and are not found in every laboratory.

Q. I believe you testified that you were not familiar with the particulars of the process which Dr. Barreto devised with relation to ascertaining the sodium contamination in wheat flour, is that true?

A. That is true.

Q. So that you are not in position now to say just what Dr. Barreto did or did not do in connection with that particular test?

A. I was unable to obtain the exact details of this method, since, as I stated before, the article describing it is not available and the method is not in ordinary common use as are other methods for sodium.

Q. For a chemist to have a particular process devised by him to be published in a text as well known as Welcher's and Mellen's publications, is noteworthy, is it not?

A. I would have to answer that by saying that

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sometimes it is. The description of the method in the two books mentioned is extremely brief and apparently copied more or less from an abstract of the original article, this abstract having been printed some time ago in a chemical publication [305] known as "Chemical Abstracts."

Q. Isn't it true that both Wlecher and Mellen are recognized authorities in the field of chemistry?

A. They are recognized as the authors of these two books which are compilations of methods and which do not necessarily contain the experience of the authors with the methods—that is true, of course, of other books of the same general type.

Q. But for a chemist to secure recognition by such well-known authors as I mentioned before, is something that a chemist might well be proud of it?

A. Yes, a chemist could be proud of it.

Q. I notice Dr. Barreto has testified that in addition to being a professor in the Military Technical School in Brazil, that he was also a technical consultant in Brazil of the Monsanto Chemical Company. You, of course, know of that company, do you not? A. Yes, I do.

Q. That is one of the largest and best known companies in the world, I take it? A. It is.

Q. So that you would presume a company of that standing in the chemical field would doubtless search for some chemist of outstanding ability to be its consultant?

A. I assume they would employ consulting chem-

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ists of [306] ability in the particular field in which their services were desired. I do not know, of course, in what way Dr. Barreto served the Monsanto Chemical Company.

Q. In answer to the 13th interrogatory, Dr. Barreto testified that qualitative tests were made by the flame method, and that the flame was pure yellow, intensive and high, and that for the quantitative test he used his own test which, as we said before, was published in those two authoritative books, so that, as you have testified, you were not familiar with the quantitative test he made of his own improvisation, other than the Volhard test, you are not in position to comment upon the sufficiency or insufficiency of what he did under those circumstances?

A. That is true, I am not in a position to comment on the precision and accuracy of the method which he devised.

Q. He also, as a quantitative test, employed the Volhard Process? A. Yes.

Q. And as I understand it, that is also a quantitative test?

A. A quantitative test that has been in use for a great many years and has wide and complete acceptance.

Q. In answer to cross-interrogatory No. 10, which is: "What is the basis of your opinion 'that the damage ascertained must be contributed to salt water,' and please [307] explain this in detail,"

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Dr. Barreto replied that "I have had long experience in this line and have made hundreds of analyses of wheat flour. I have analyzed fresh water contamination and only a vestige of sodium chloride was present." Now, Doctor, would you say that the analyses of hundreds of samples of wheat flour would enable a chemist of Dr. Barreto's qualifications to readily determine whether a particular sample had been damaged by salt water or whether it was the natural salts in the flour, or had been contaminated by some other element?

A. I would say that the experience in analyzing a considerable number would seem to be a sufficient experience, but that the exact number is comparatively unimportant, in fact a chemist who had analyzed only the flour in question would be able to determine that point of the specific nature of the damage, basing his conclusion upon known analyses of flour and different waters which are available to all chemists.

Q. Referring to your experience in making analyses of samples of wheat flour which had been in contact with fresh water, have you found that that disclosed only a vestige of sodium chloride as a rule?

A. As a rule, when wheat flour has been wetted by fresh water, the increase in the sodium chloride content of the flour is small and is of the order of magnitude of the [308] sodium chloride normally present in wheat flour. This, of course, will vary

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depending upon the composition of the fresh water in question and the composition of fresh water varies over quite a considerable range.

Q. In that relation, assume that a sample of flour from the same sack was placed in contact with sea water and a similar analyses was made to ascertain the sodium chloride content of that, that would show a considerable advance in sodium chloride content than that which had been ascertained in relation to the fresh water damage, I take it?

A. I would expect that the increase in the sodium chloride content of the flour would be quite marked.

Q. Let's assume that those two samples of flour—that is the sea water soaked sample and the fresh water soaked sample—were subjected to a silver nitrate test, is it true that that marked difference would also show up upon that test?

A. As I explained before, the silver nitrate test is a qualitative test for the per cent of chloride. It might or it might not show a difference in the two cases which you mentioned, all depending upon other circumstances of the test.

Q. Well, let's assume that the usual silver nitrate test were given to these two samples, what would you expect to find with relation to the two samples—would you say, [309] on the basis of your experience, which had been in contact with sea water and which had been in contact with fresh water?

A. The qualitative test might very well show

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that one sample had considerably more chloride in—though giving no quantitative figure—than the other test.

Q. But it would enable you to determine readily that one had been damaged in a different type of water than the other?

A. I would be reluctant to make any statement to that effect, unless I made a quantitative determination of the chloride. That is, the judgment on the relative amounts of the precipitate of silver chloride obtained in such a test is more or less subjective and not as reliable as a quantitative determination which depends upon more objective methods of determining the amount of silver chloride.

Q. Reverting to the flame test: Assuming those two samples were subjected to a flame test, would you expect to find a difference between the fresh water damaged flour and the sea water damaged flour?

A. Again, in a qualitative test, I might believe that I saw a difference in the intensity of the flame, which would be the characteristic that would be evident, but I would be reluctant to make a decided conclusion without making a quantitative determination spectrometrically or by a chemical [310] method of determining the sodium.

Q. Doctor, had you been in Dr. Barreto's position down there in Rio de Janeiro, and you had personally gone to the warehouse where these ship-

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ments of 3000 bags were stored, and you saw a great number of bags of caked flour, and you personally took six samples, some of the samples being from the caked flour and some from the uncaked flour, and you made the silver nitrate and flame tests of those two lots of flour, with the knowledge you had gained as the result of having seen the shipment of caked flour and having taken these caked samples, and as I related, having made only the flame and silver nitrate tests, would you be in a position, after those tests, to determine whether or not the caked samples had been in contact with sea water?

A. As I stated before, I would be reluctant to draw a conclusion that the caked samples had been in contact with sea water unless I made a quantitative determination of the sodium and chloride present in comparison with samples of non-caked flour of the same lot.

Q. You have read the testimony of Dr. Barreto, and you have noted that he testified that he made quantitative tests based on the two processes, and that he found that there was more sodium chloride in the damaged than in the undamaged flour. What can you say as to that in relation to whether or not the caked flour had been in contact with [311] sea water?

A. I can only form an opinion, if quantitative figures had been submitted by Dr. Barreto as to the amounts of sodium chloride present. The original report indicates that only qualitative tests

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were made. In the subsequent deposition he states he made quantitative determinations. The interpretation of those determinations will depend upon the relation of the quantitative results as expressed in figures, usually in percentage.

Q. Doctor, I invite your attention to an answer given by Dr. Barreto to the 8th cross-interrogatory, and that cross-interrogatory is: "Your report states: 'Chlorides * * * presence' and 'sodium * * * presence.' What percentage does this mean, or can you state the percentage or amount of chlorides and sodium present in the alleged damaged flour." In answer to that cross-interrogatory Dr. Barreto testified "By 'presence' is meant that there is too much chloride and sodium. I can't remember the percentages." You will note from that answer that Dr. Barreto did obtain percentages but that he could not recall at the time this deposition was taken what those percentages were. Does that not indicate to you that he made quantitative tests?

A. It indicates to me that he probably did make quantitative tests, as he states that to be a fact, but I would say that is not submitting the results of such [312] quantitative tests in support of his conclusion, that there was too much sodium chloride present, is not the customary procedure and might even be called unprofessional."

Mr. Howard: I move to strike the last observation of the witness as not responsive to the question.

Mr. Wakefield: I think it is proper, Your Honor.

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The Court: The objection is overruled. The trier of the fact will have in mind the witness in New York is talking about something that was done at Rio de Janeiro.

“Q. By “customary procedure,” you are now referring to the customary procedure as it is practiced in the United States, I take it? You, I presume, never practiced the profession of chemistry in Brazil?

A. No, I never practiced the profession of chemist in Brazil, but procedure—customary scientific procedure—would be, I believe, pretty well universal and recognized in most countries where scientific men practice their profession, and that it would be customary to submit exact data in support of any conclusion reached by a witness.

Q. Having in mind Dr. Barreto’s qualifications, and having also in mind the various tests which he made in relation to ascertaining whether or not the caked samples [313] had been in contact with salt water, and having ascertained percentages, although he didn’t recall them, and having formed a conclusion that those caked samples of flour had been in contact with sea water, what would you say as to whether or not reliance could be placed upon Dr. Barreto’s conclusion that the caked samples had been in contact with sea water?

A. I would say that any other chemist or consultant would be unable to decide whether or not Dr. Barreto’s conclusion was justified unless Dr.

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Barreto had submitted the actual results of his quantitative determination. I would assume, as a matter of general professional practice and custom, that Dr. Barreto had these figures in a notebook or some other record, and that he could have submitted the figures."

Mr. Howard: I move to strike the last sentence of the answer as an assumption of the witness, a voluntary statement, and not responsive to the question.

The Court: Beginning, "I would assume"?

Mr. Howard: Yes, Your Honor.

Mr. Wakefield: I submit that is just exactly what the cross-examiner has asked him. He asked him about Dr. Barreto's practice, what he thinks of it.

The Court: The request to strike is denied. The [314] objection is overruled.

"Q. Are you aware, Doctor, that this examination which Dr. Barreto was called upon to make, was not made at the request of Health Authorities nor in relation to any similarly related matter, but was made for the purpose of determining the nature of the contamination, so that the question might be determined as to whether or not the loss fell within the coverage of a certain marine insurance policy? Under those circumstances, would you say that there was any requirement to record and preserve percentages of sodium chloride content of the damaged flour?

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A. I certainly would feel that in such a case, even though Dr. Barreto was not acting for any governmental bureau or department, it would be essential and good professional conduct to retain the figures and records of his actual determination.

Q. I believe you said you have never practiced the profession of chemistry in Brazil?

A. That is true.

Q. Have you practiced that profession in any other foreign country? A. No.

Q. So your experience as to what is not proper in the [315] field of chemistry, in relation to tests and recording of same, is limited to what is done in the United States?

A. My experience is actually in respect to usage in the United States. However, it is my understanding and belief that scientific usage is almost universal in essential character practically all over the world. I cannot state, of course, whether there is some special custom in Brazil or in some other special country you may happen to mention, but scientists in general have, through years of experience, come to adopt rather universal methods of practice, you might call it.

Q. Doesn't your testimony amount to this, Doctor: That is, that Dr. Barreto is a qualified chemist, that he made a series of tests which are recognized tests to determine the sodium chloride content of flour, that having made those tests he arrived at the conclusion that the caked flour was damaged

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by sea water, but that by reason of his lack of percentages of sodium chloride, you are not in a position to check the accuracy of his conclusion—doesn't it amount to that?

A. I am not in a position to check the accuracy of his conclusion without the quantitative figures of his quantitative analysis.

Q. You do not characterize his conclusion on the basis of professional standing or ability nor inadequacy of tests, [316] but merely upon the sole basis that you are unable, on the data furnished by Dr. Barreto, to check the correctness of his conclusion?

A. I am, of course, in no position to comment on Dr. Barreto's professional standing and on his personal qualifications. I am not in a position to comment on the method which he used for the determination of sodium, which is a method which he himself devised, simply because the method is not in common use and is not a commonly accepted method and has not been checked, to the best of my knowledge, by other chemists. It is a common occurrence, in the chemical field, to have a man describe a method for a specific chemical determination. Such methods are usually not accepted as authoritative unless they are checked by other chemists working independently."

The Court: I want you gentlemen to note this as an example of the foolishness of turning a witness loose in a distant place, in a deposition, and

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let him go on in a discursive manner. It takes up the Court's time on an occasion when you and I and everybody connected with this case should be getting down to the pertinent facts, instead of listening to pages of this discussion.

Mr. Howard: I move to strike the last portion of his answer as not responsive to the question, beginning [317] with "This is true in respect, for instance."

The Court: I will not strike it, but it is a fault of our procedure more than anything else. I will say to you as a fact trier that it is a useless use of time, but it seems to be engrafted upon our procedure.

"This is true in respect, for instance, to the methods described in the two books on analysis which I mentioned previously—that is the one published by the Association of Official Agricultural Chemists and the American Association of Cereal Chemists. Methods in such books have been checked and re-checked many times before they are published in this form, but many times methods are proposed in literature that afterwards are shown to be inadequate or even inaccurate under certain conditions. I do not know anything about Dr. Barreto's method for sodium other than the very brief and inadequate description in Welcher's and Mellen's, which descriptions were obviously copied from a brief abstract of Dr. Barreto's original article. If I were asked to use Dr. Barreto's method, I would first

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of all, of course, obtain the complete details of the method and then I would very carefully determine its accuracy and precision by check methods. In other words, I do not know whether Dr. Barreto's method for sodium is a perfectly reliable method or not. [318]

Q. You will recall that Dr. Barreto used the Volhard Process as well as his own process?

A. Yes.

Q. I take it you have no criticism of the Volhard Process?

A. The Volhard method for the determination of chloride has been checked many times, and if carried out exactly according to the procedure is a reliable method.

Q. My recollection is that some time back in this testimony, you expressed the view that, based on the testimony given in the deposition, Dr. Barreto appeared to be a qualified chemist?

A. I expressed the view, based on his own statements in his deposition. I do not know Dr. Barreto by name and reputation, never heard of him before this matter came up.

Q. Assuming that Dr. Barreto employed the flame and silver nitrate tests, as well as the Volhard method, I take it that your criticism of his conclusion that the caked samples were damaged by sea water is based on the fact that he did not supply percentages to enable you to check his results with

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what you think would have to be the sodium chloride content to establish sea water contact?

* * *

A. As I stated before, the silver nitrate and flame tests do not give quantitative figures. My inability to say [319] whether or not Dr. Barreto's conclusion as to the cause of the damage being due to sea water, is based upon the fact that there are no quantitative figures submitted by him as to the amounts of sodium and chloride in the flours in question."

Mr. Howard: I am willing to waive the next question, the last question on page 44, all of page 45, since it relates to the matter of sea algae, which was testified to by Dr. Barreto and which the Court struck from his testimony on motion of respondent. That would take us to the last question on page 46.

"* * *

Q. Doctor, you testified about the mold, bacteria and fungus being a dormant condition in all flour, and that under certain conditions they will develop and cause damage. That does not ordinarily happen in connection with shipments of flour between, say, North and South America, merely from the humidity in the air—in other words, you must have some casualty or contact with water in volume?

A. I could not say from direct experience whether it happens frequently during the passage

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from the United States to South America. All I can say is that if the moisture content of the flour rose sufficiently high, and if the [320] temperature were well adequate—because temperature is always a factor in the growth of micro-organisms—and if time were adequate, that such micro-organisms which are present in a dormant state in most flours, would develop to some extent. The source of the moisture is immaterial to the organisms, whether it comes from wetting with fresh water or sea water or whether it is due to the absorption of moisture from the air or any other source of moisture. All the organism wants is enough moisture in order to grow—a decent temperature and a little time.”

Mr. Howard: If the Court please, reverting back to my willingness to waive those questions, I would like to have it understood that I am doing so on the basis of the Court’s ruling on sea algae, and assuming that objections would be made by respondent to such questions.

The Court: Let the record show that.

“Q. If under ordinary atmospheric conditions prevailing on voyages between North and South America, this dormant condition of mold, bacteria and fungus would develop, it would be impractical and uneconomical to make shipments of flour between the two continents, would it not?

A. If under ordinary conditions, I assume it would be [321] very difficult to make such shipments without having the organism proliferate.

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Q. So as we have a large volume of trade between North and South America in flour consignments, it would appear that it requires some very heavy saturation to bring about a condition such as was found by Dr. Barreto, isn't that true?

A. I, of course, do not know how often such micro-organisms develop in flour shipped to South America. I assume, as a matter of reason, that it is not too frequently from a financial standpoint, but I can imagine that under some conditions of storage or exposure, the flour might acquire sufficient moisture in some cases to allow the organisms to grow.

Q. You will agree, will you not, that contact with sea water would definitely cause such a condition?

A. Certainly it would, but that is not the only cause.

Q. You testified in relation to the number of samples which ordinarily would be taken from a shipment of 3000 bags?

A. Yes.

Q. And I believe your estimate was something in the neighborhood of 50?

A. 50 to 60.

Q. If you had a shipment of caked bags of flour, why wouldn't one sample of that caked flour be sufficient to [322] disclose whether or not that had been in contact with salt water?

A. If all of the bags of the shipment had been damaged by contact with sea water, it is probable that every sample taken would, on analysis, indi-

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cate that fact. However, it is statistically important, in sampling a shipment or a lot of a product, to use such measures and methods that will demonstrate a very high degree of probability that the damage in all cases is due to the cause assigned to it.

Q. It is merely a question of securing further confirmation?

A. It is merely a question of establishing a high degree of probability that the entire damage is due to the cause in question. I might add here that in any determination of the composition of almost any product, whether it is foods or mineral or something else, the sampling is always considered to be a high degree of importance, perhaps of equal importance to the exact analysis, and establishes the reliability of the results obtained by the analysis. I can also add that when a number of samples are taken—an adequate number—that it is customary to analyze each sample individually.”

Mr. Howard: That concludes cross-examination of this witness. [323]

Mr. Wakefield: The redirect does not appear to me to be important, Your Honor. Unless counsel wants it read, I think we can dispense with it.

Mr. Howard: That is agreeable to proctor for libelant, and as proctor for libelant I am also agreeable to waiving the recross-examination.

The Court: This finishes the reading of the deposition. Do you offer this as part of respondent's case in chief?

Mr. Wakefield: Yes, Your Honor.

The Court: This deposition of the witness Percy W. Punnett is received as such.

Mr. Wakefield: The last deposition I have, Your Honor, is a short one of Dr. de Camargo.

DEPOSITION OF BRAZ DE CAMARGO

Direct Examination

“Interrogatory No. 1: Please state your full name, age, residence and nationality.

First—To the First Interrogatory He Says:

Braz Sergio Olivier de Camargo, 38 years, Rua Nascimento da Silva, 182, Rio de Janeiro, Brazil.

Interrogatory No. 2: What is your profession and for how long have you been engaged in your profession?

Second—To the Second Interrogatory He Says:

Attorney at law since graduation in March, 1932.

Interrogatory No. 3: If in answer to the foregoing [324] interrogatory you have stated that you are an attorney at law, please state in some detail the nature and extent of your experience and practice as an attorney at law.

Third—To the Third Interrogatory He Says:

I was a district sheriff of police, State of Sao Paulo, Brazil, then I worked in the Legal Department of the Bank of London in Sao Paulo. I practiced law privately in Sao Paulo and later worked with Richard P. Momsen in Rio de Janeiro for twelve years. I have been privately established in Rio de Janeiro since April 1, 1948.

(Deposition of Braz de Camargo.)

Interrogatory No. 4: Within your experience and practice, have you had occasions to deal with various laws and regulations of Brazil relating to Customs and the Custom House.

Fourth—To the Fourth Interrogatory He Says:

Yes.

Interrogatory No. 5: Do you in your professional experience have knowledge of the Customs laws and regulations of Brazil now in force, and those laws in force in February of 1946?

Fifth—To the Fifth Interrogatory He Says:

Yes.

Interrogatory No. 6: Are you acquainted with the various Custom House regulations in force in February of 1946?

Sixth—To the Sixth Interrogatory He Says:

Yes.

Interrogatory No. 7: Please state whether the following regulation, being Article 279 of Custom House Regulations, is to your knowledge and within your experience a regulation which was in full force and effect in Rio de Janeiro in February, 1946:

“Article 379. The longshoreman foreman, his assistants, warehouse keepers, and guards attending discharge and in charge of organizing records are responsible for pointing out all packages turning up damaged, broken, re-nailed, or in any way damaged, this circumstance also to be noted on discharge sheets,

(Deposition of Braz de Camargo.)

the necessary declarations being noted down on the same day as packages are discharged. (Decree n. 355 A of 25th April, 1890, Art 11.)”

Seventh—To the Seventh Interrogatory He Says:

Yes. It is a provision of the Nova Consolidacao das Leis das Alfandegas e Mesas de Renda which I think is dated 1890.

Interrogatory No. 8: If the foregoing regulation (Article 379) is not a correct statement of the regulation of the Custom House in effect in February, 1946, please set forth in full the regulation which was then in effect pertaining to the requirement for noting damage in Custom House records on all cargo discharged from vessels at Rio de Janeiro.

Eighth—To the Eighth Interrogatory He Says:

It appears to me to be a correct statement.

Interrogatory No. 9: Please set forth the text of Article 463 of the Custom House regulations, and state whether [326] said article was in full force and effect in February, 1946.

Ninth—To the Ninth Interrogatory He Says:

In view of the numerous articles of the Consolidacao it is practically impossible to know them by heart.

Interrogatory No. 10: Please set forth the text of any other law or regulation dealing with the receipt, notation or recording of damaged cargo discharged from vessels at Rio de Janeiro which was in effect in February, 1946.

Tenth—To the Tenth Interrogatory He Says:

(Deposition of Braz de Camargo.)

There are several regulations and provisions dealing with the discharge of cargo at the several individual ports of Brazil issued by the respective port administrations, but none can conflict with the rules set forth in the Nova Consolidacao which rules the notation and recording of damaged cargo discharged for customs house duties exemptions. The Nova Consolidacao rules for all of Brazil and for customs house duty purposes the notation for damaged cargo discharged at all ports.

Interrogatory No. 11: Based upon the laws and regulations of Brazil as noted above and your experience in your profession, please state whether or not the Brazilian Customs officials or employees are required to and do inspect all cargo discharged from ships at Rio de Janeiro, and make notation of any damage to cargo in the Custom House records." [327]

Mr. Howard: Libelant objects to that interrogatory as it has not yet been made to appear that this witness has any actual knowledge over and beyond his experience based on his acquaintance with Brazilian laws and custom regulations.

The Court: Is the question conditioned upon this witness' knowledge? Is it "if he knows"?

Mr. Wakefield: Yes. "Based upon the laws and regulations of Brazil as noted above and your experience in your profession, please state whether or not * * *"

Mr. Howard: Then it proceeds to ask him whether they do inspect.

(Deposition of Braz de Camargo.)

The Court: The objection is overruled.

“Eleventh—To the Eleventh Interrogatory He Says:

The Brazilian customs house officials are required to inspect all cargo discharged and make notation of any damage. The consignees generally insist on such notations since it is on said notations that the custom house duties are assessed.

Interrogatory No. 12: In your opinion, please state whether in the case of bags of flour discharged from a vessel at Rio de Janeiro in February, 1946, which flour was at the time of discharge damaged by contact with salt water and resulting in staining and caking of the bags, this condition is required to be and as a matter of actual practice would [328] be noted and stated in the Custom House records.”

Mr. Howard: Same objection, and further, this question is not qualified as being based upon his knowledge of laws and regulations and experience in his profession. He is asked to state as a matter of actual practice whether a certain thing is done, and it was not shown that he was present or had any personal knowledge on the occasion referred to in February, 1946.

The Court: I understand that the question, as in the preceding question, essentially calls for his knowledge of the laws and customs of Brazil touching the issues involved in this inquiry. I think it is reasonable to so understand the questions, and the objection is overruled.

(Deposition of Braz de Camargo.)

“Twelfth—To the Twelfth Interrogatory He Says:

In my opinion, this condition would have been noted by customs house officials and even if his attention had not been drawn to such bags in the condition as described in Question No. 12, the representative of the consignee at the time of discharge would probably have called the attention of the official to it. It is doubtful that the official would not have noted the condition of the bags to avoid future doubts with reference to the duties.”

The Court: The Court has in mind the weight and effect of the answer as being that which should be attributed to comment and possibly some argument.

“Cross-Interrogatory No. 1: Were you, in February and March, 1946, acquainted with, or did you then have knowledge of, a shipment of flour discharged from the S. S. ‘Sweepstakes’ at Rio de Janeiro on or about February 20, 1946, and consigned to Companhia Luz Stearica?

First—To the First Cross-Interrogatory He says:
No.

* * *

Cross-Interrogatory No. 3: Is your answer to direct interrogatory No. 11 based on actual knowledge of the inspection of all cargos discharged from ships at Rio de Janeiro and actual knowledge of notation of any damage to such cargos in the Customs House record on each and every shipment?

(Deposition of Braz de Camargo.)

Third—To the Third Cross-Interrogatory He Says:

Yes, because as attorney I have had to present pleas for captains of ships which discharged merchandise short, said captains being then held responsible for customs house duties on merchandise not discharged.

* * *

Cross-Interrogatory No. 5: Is it not a fact that the inspection of cargo and notation of any damage to such [330] cargo referred to in interrogatory No. 11 is usually accomplished when such cargo passes through the Brazilian Customs Warehouse at the port of Rio de Janeiro?

Fifth—To the Fifth Cross-Interrogatory He Says:

No. The inspection of cargo is made at discharge from vessel. Further inspection is later on made for certain goods, such as machinery, autos, etc., for tax purposes and proper classification under the tariff when goods pass through the customs warehouse.

Cross-Interrogatory No. 6: Is it not a fact that the inspection of cargo and notation of any damage to such cargo by Brazilian customs officials or employees may be waived or omitted, where by special arrangement the consignee has paid the duty prior to discharge and has secured permission for discharge directly from ship to rail cars for immediate shipment to private warehouse of consignee, without passing through Brazilian Customs Warehouse?

(Deposition of Braz de Camargo.)

Sixth—To the Sixth Cross-Interrogatory He Says:

They (the customs officials) generally inspect the cargo. If this was not done for certain cargoes, for which permission by special arrangement has been obtained, the officials would not be able to check that the duties have been properly paid.

Cross-Interrogatory No. 7: If it is assumed that the particular shipment of flour involved in this litigation was by special arrangement with customs officials discharged [331] directly from the ship to rail cars for conveyance to private warehouse of the consignee, without passing through Brazilian Customs Warehouse, is it not possible that Brazilian customs officials did not inspect all of such cargo upon discharge or make notation of any damage to such cargo in the Custom House record?

Seventh—To the Seventh Cross-Interrogatory He Says:

It may be possible but it is very doubtful, since customs officials have a percentage of the fines imposed on the parties who do not declare exactly the nature of the cargo. It would be in the interest of the official to check any cargo, and, if shortlanded, fine the captain of the ship.

Cross-Interrogatory No. 8: Is your answer to direct interrogatory No. 12 based on actual knowledge of the method of handling the specific shipment of flour consigned to Campanhia Luz Stearica involved in this litigation, or is your opinion based on your knowledge of the text of Brazilian laws and regulations, or otherwise?

(Deposition of Braz de Camargo.)

Eighth—To the Eighth Cross-Interrogatory He Says:

My opinion is based on my knowledge of Brazilian law and my experience as an attorney.

Cross-Interrogatory No. 9: State what if any personal knowledge you have as to whether the shipment of flour consigned to Companhia Luz Stearica and discharged from the S.S. "Sweepstakes" on or about February 20, 1946, did actually pass through customs warehouse and inspection at Rio de Janeiro after discharge.

Ninth—To the Ninth Cross-Interrogatory He Says: None.

Cross-Interrogatory No. 10: Is your answer to the preceding interrogatory based on personal observation of the shipment of flour in question after discharge from the S.S. "Sweepstakes"?

Tenth—To the Tenth Cross-Interrogatory He Says: No.

Cross-Interrogatory No. 11: When and in what manner and by whom was the matter of your giving this deposition first brought to your attention?

Eleventh—To the Eleventh Cross-Interrogatory He Says:

By Mr. Botelho, about one or two weeks ago, by telephone. I told him I was too busy at the time and that as soon as I could go, I would give my deposition.

Cross-Interrogatory No. 12: With whom and when did you first discuss the matters you have

(Deposition of Braz de Camargo.)

testified to in this deposition, either verbally or by correspondence? Please explain in detail.

Twelfth—To the Twelfth Cross-Interrogatory He Says:

With Mr. Botelho, at the time he called. I was rather busy at the time and a little annoyed that my name had been given. [333]

Cross-Interrogatory No. 13: Are you regularly engaged, or do you serve as correspondent attorney for the Moore-McCormack Lines at Rio de Janeiro or other Brazilian ports, in connection with cargo damage claims?

Thirteenth—To the Thirteenth Cross-Interrogatory He Says:

At the moment and since April 1, 1948, I am not engaged as an attorney for Moore-McCormack Lines in connection with cargo damage claims."

The Court: Does respondent offer this deposition as part of respondent's case in chief?

Mr. Wakefield: Yes, Your Honor.

The Court: It is received as such.

Mr. Wakefield: That concludes the respondent's case. Respondent rests.

The Court: Is there any rebuttal?

Mr. Howard: I have one witness in person on rebuttal, Your Honor.

The Court: You may call him.

FRANCIS P. OWENS

called as a witness by and on behalf of libelant, having been first duly sworn, was examined and testified as follows: [334]

Direct Examination

By Mr. Howard:

Q. Will you state your full name and residence address?

A. Francis P. Owens, 2739 38th Avenue S.W.

Q. What is your business or occupation?

A. I am a chemist.

Q. Where are you employed?

A. With Laucks Laboratories, Inc.

Q. For how long?

A. I have been with them for going on 16 years.

Q. What duties do you perform? What is your position with Laucks Laboratories?

A. I am secretary-treasurer of the company, and my duties consist of directing the work that is done in the laboratory itself, the analytical work.

Q. What schools or colleges are you a graduate of, and when?

A. I was graduated from Washington State College at Pullman with a degree of Bachelor of Science in Chemistry, in June, 1933.

Q. Did you take any graduate courses?

A. I took some graduate work at the University of Washington in 1940.

Q. In what subjects?

(Testimony of Francis P. Owens.)

A. Bacteriology. [335]

Q. Are you a member of any professional societies or organizations? A. Yes, sir.

Q. What, please?

A. I belong to the American Chemical Society and the American Institute of Chemists, and the American Association of Cereal Chemists.

Q. Are you a member of the Institute of Food Technologists? A. Yes, sir, I am.

Q. Are you an officer in any capacity of the American Association of Cereal Chemists?

A. At the present time, I am president of the Pacific Northwest section.

Q. In your duties as a chemist and since you have been engaged in those duties, have you ever had any occasion to analyze samples of flour or cereal or grain products for any particular purpose? A. Yes, sir, I have.

Q. How frequently have you been called upon to do that?

A. We average, I would say, a minimum of one sample a week.

Q. What is the purpose of those tests or analyses that you make?

A. Well, the purpose is usually to determine the quality [336] of the product and to establish its values as a food product.

Q. Have you ever tested samples of grain or cereal products for salt water contamination?

A. Yes, sir, I have.

(Testimony of Francis P. Owens.)

Q. Are the tests that you would use for that the same as would be used for testing flour samples for similar contamination?

A. The general procedures are the same.

Q. How frequently have you been called upon to conduct such tests?

A. Well, it has been innumerable times. I have never tabulated or attempted to tabulate the number of times I have, but it has been very often.

Q. Have you read the report, the translation of the report of Dr. Barreto, a chemist at Rio de Janeiro, in connection with this shipment of flour of 10,500 bags?

The Court: Let the record show that report is in evidence as Libellant's Exhibit 4.

A. Yes, sir, I have.

Q. Have you also read the deposition of Dr. Barreto, the questions and answers that were sent to and answered by him?

A. I have.

Q. Have you also read the deposition of Dr. Punnett, a witness who testified in New York, a chemist from Pease [337] Laboratories?

A. I have.

Q. Incidentally, a Mr. Thomas Williams testified yesterday that the chloride content of ash of wheat flour ranged from .1 per cent to 0 per cent, and he cited as an authority for that a text by John Wiley on chemistry, on chemical procedures, Vol. 1, p. 238. Do you agree with that statement?

Mr. Wakefield: Just a minute. I object to the

(Testimony of Francis P. Owens.)

question, if the Court please, as not proper rebuttal. This witness, I take it, is called to impeach an impeaching witness. Mr. Williams was called by us to impeach Dr. Barreto, and this witness is now called to impeach Mr. Williams. I think Your Honor knows impeaching an impeaching witness is beyond the scope of testimony permitted on rebuttal, because we could go on indefinitely if we could impeach each impeaching witness. The rule is that you can't call a rebuttal witness to impeach an impeaching witness. I submit this is not proper rebuttal in any sense of the word.

The Court: The objection is sustained, so far as the Court's opinion upon the asserted situation is concerned. The Court is more specific, however, in sustaining the objection relating to the form of this question. I can conceive of the possibility of asking [338] the witness a proper form of question, but at least as to what has been asked, the objection is sustained.

Q. Can you state what the chloride content of ash of wheat flour would be?

Mr. Wakefield: I object to that as not proper rebuttal. That is a part of libellant's case in chief, to prove what the standard content would be.

The Court: I will hear counsel's response.

Mr. Howard: Your Honor, that was not put in issue in this case until respondent's case, when he brought in the testimony of Dr. Punnett as to one statement as to percentage of chloride content of

(Testimony of Francis P. Owens.)

ash of wheat flour, and then he brought in the witness Mr. Williams, who testified otherwise.

I am trying to develop from this witness what the content is, and it was not developed on libelant's case in chief. It was raised after respondent put in an expert witness, and respondent examined the expert witness on that. I submit it is proper rebuttal under those circumstances.

Mr. Wakefield: Dr. Barreto testified to this in his deposition. The content of this chemical in the ash is one of the things that—in normal uncontaminated flour is one of the things Dr. Barreto was asked.

Mr. Howard: Your Honor, in order to facilitate this, [339] I will withdraw the question.

Q. What tests are usually made on samples of cereal flour products to determine whether there has been salt water contamination, in your experience?

Mr. Wakefield: That is objected to as not proper rebuttal, part of the libelant's case in chief.

Mr. Howard: The issue in this case as it is now resolved, by reason of respondent's witnesses who have been called for the sufficiency of tests made by Dr. Barreto—we considered calling this witness on direct and had him available for many months to call him on direct, but after careful consideration it was concluded his testimony would be more proper as rebuttal evidence after the evidence had been put in by respondent, and the questions which

(Testimony of Francis P. Owens.)

I propose to put to him have been very carefully prepared as rebuttal questions and not as part of libelant's case in chief, the questions directed as to the issues raised by respondent's witnesses who testified by deposition and in person.

Mr. Wakefield: I submit that "what tests are used" isn't to rebut anything. We are embarking on new testimony as to what proper tests are.

The Court: The objection is overruled. Read the question.

(Last question read by reporter.) [340]

A. In our experience, the usual tests that are made are for the presence of chlorides, sodium, calcium, sulphates and magnesium.

Q. What tests would be used for sodium?

A. There are two tests which we employ. We employ what is commonly referred to as the flame test.

The Court: Leave out what you especially do. Just answer the question directly, if you know the answer.

The Witness: The flame test and the spectrographic test.

Q. What test would be used for chlorides?

A. The Volhard test.

Mr. Wakefield: I submit this isn't rebutting anything. It is just a repetition of the same thing we have had from these other witnesses.

The Court: I ask counsel examining to consider

(Testimony of Francis P. Owens.)

carefully what aspects of the witness' Punnett's expert testimony, if any, were not gone into on libelant's case in chief; and if there are any such instances, if you care to direct this witness' attention to those instances, ask him supposititious questions and get his opinion upon them without giving him an opportunity to expressly dispute the validity of the witness Punnett's answers.

Mr. Howard: Your Honor, over my objection the respondent was allowed to interrogate his witnesses as [341] to the validity and reliability of the findings and conclusion of Dr. Barreto, the chemist who testified on our direct case. That is the testimony that I am particularly referring to in respondent's case, where over objection the Court permitted such testimony to be given by those witnesses.

The Court: This question seeks to reach what?

Mr. Howard: Preliminary to my questions which will correspond to the questions which respondent was allowed to interrogate his witnesses.

The Court: I do not wish to cut counsel off if you have not covered it, but the Court is ready to rule.

Mr. Wakefield: It is my position, Your Honor, that you cannot as a matter of law of evidence call a witness to impeach an impeaching witness, and that is all he is doing here. He is calling this man to impeach either Dr. Punnett or Mr. Williams, who in turn had been called to impeach Dr.

(Testimony of Francis P. Owens.)

Barreto, and therefore it isn't proper rebuttal for that reason, and it isn't proper rebuttal for the further reason that it isn't rebutting anything that the respondent testified to.

The Court: I am not convinced that the libelant was required to anticipate respondent would attack the methods used by Dr. Barreto. It seems to me that the effect of the witness Punnett was to attack the [342] sufficiency and validity of the methods. As applied to what is now occurring, the Court overrules the objection.

Mr. Howard: Just one more statement, very briefly. Libelant could not very well put on this testimony on its case in chief until the testimony had come in of Dr. Punnett and Mr. Williams, which is the testimony we seek to defend against.

The Court: The Court overrules the objection.

Q. In making tests for sodium and chloride, particularly chloride, can the Volhard process be used qualitatively? A. Yes, sir.

Mr. Wakefield: I object to that. There is no issue on that. Everybody agrees that the Volhard test can be used qualitatively, but it isn't conclusive.

The Court: The answer is made and will stand.

Q. What chemical properties or constituents would be found in markedly increasing quantities or amounts in samples of wheat flour which had been contaminated by salt water?

A. Chlorides, sodium, calcium, magnesium and sulphates.

(Testimony of Francis P. Owens.)

Mr. Wakefield: Was that in flour which had not been contained?

Mr. Howard: Samples of wheat flour which had been contaminated by salt water.

Mr. Wakefield: I thought you said "had not been."

Q. Did you understand my question to be which had been [343] contaminated by salt water?

A. Yes, sir.

Q. How would you determine in samples or analyses of wheat flour whether the chloride content was attributable to salt water rather than some other form of chloride contamination?

Mr. Wakefield: I object to that again. If this man is called to support Dr. Barreto, which obviously could be the only justifiable purpose, I submit he should be asked questions which incorporate what Dr. Barreto did, rather than to give us his own testimony as to how you find chlorides. That isn't rebuttal at all.

The Court: Do you expect to connect his answer up with an attitude that is harmonious or in agreement with what Dr. Barreto did?

Mr. Howard: Yes, Your Honor, and respondent's witnesses were allowed to answer the same questions.

The Court: The objection is overruled. Do you have the question in mind? Read the question.

(Last question read by reporter.)

(Testimony of Francis P. Owens.)

The Witness: That is usually confirmed by the presence of significant quantities of calcium, magnesium and sodium and sulphates.

Q. Would these last four elements that you mentioned be found in other chlorides, such as table salt? [344]

A. No, sir, not in table salt.

The Court: Court is recessed until 1:30.

(At 12:05 o'clock p.m., Wednesday, November 2, 1949, proceedings recessed until 1:30 o'clock p.m., Wednesday, November 2, 1949.)

Seattle, Washington, November 2, 1949, 1:45 o'clock p.m.

Q. Mr. Owens, does the Barreto report, Libellant's Exhibit 4, indicate that a test was made for the presence of calcium and magnesium, as well as sodium and chloride? A. Yes, sir.

Q. Does the amount of sodium and chlorides vary greatly in different grades and qualities of wheat flour?

Mr. Wakefield: I want to object again to the question as not being proper rebuttal. I have here a statement which I think covers the situation, 53 Am. Jur., Sec. 121, Evidence in Chief on Rebuttal. "As a general rule, the party upon whom the affirmative of an issue devolves is bound to give all his evidence in support of the issue in the first instance, and will not be permitted to hold back part of his evidence confirmatory [345] of his case and

(Testimony of Francis P. Owens.)

then offer it on rebuttal. Rebuttal testimony offered by the plaintiff should rebut the testimony brought out by the defendant and should consist of nothing which could have been offered in chief."

All he is doing here is trying to bolster Dr. Barreto's report, or explain it, and if that report needed bolstering or explaining, it was part of his case in chief to do so.

Mr. Howard: Your Honor, I would like to read from the same text, the preceding section, entitled, "Sec. 120. Rebuttal." In the middle of that section, "What is rebuttal evidence rests largely within the discretion of the trial court. However, rebuttal evidence may as a general rule pursue the same scope as that developed by the evidence in chief given against the party offering the rebuttal evidence, even though such evidence may have been inadmissible in chief over the objection of the adversary."

The Court: Will you pass that book to me? I want to see it.

I have the same view, gentlemen—I have considered both of these statements mentioned by counsel in their statements in connection with this objection—that I am not convinced that the libelant was bound to anticipate in connection with libelant's case in chief that the [346] respondent would through the testimony of the witness Punnett or otherwise question the validity of the tests made by the libelant's witness Dr. Barreto. Therefore, this objection is overruled.

(Testimony of Francis P. Owens.)

Mr. Wakefield: Just so that we will not have to make interruptions, Your Honor, may I suggest this: That my objection, in view of Your Honor's ruling, will go to all the evidence other than the actual testimony of the witness about the Barreto report. I think if he is asked about Dr. Barreto's report, then it is possibly proper under Your Honor's ruling, but to go through the whole field of chemical analysis with respect to——

The Court: I think it might be helpful if counsel for libelant could indicate the scope of this inquiry, in view of the last statement by Mr. Wakefield.

Mr. Howard: After showing what this witness—the familiarity of this witness with the chemical tests and procedures and the nature of the tests that were made by Dr. Barreto, I intend to develop from this witness that he has made similar tests for comparative purposes, and ask the witness to testify as to what those tests indicate as to whether it is reliable for the determination of salt water contamination. Essentially, that is what the balance of the examination of this witness will consist of.

Mr. Wakefield: May I suggest in that connection that that is the very type of testimony which is improper. He proposes to have this witness show what kind of a test should be made and what the results are.

This deposition of Dr. Punnett, to which Your Honor referred, was taken in April, 1949, five or

(Testimony of Francis P. Owens.)

six months ago. Counsel has had a copy of that deposition for that length of time, and I submit that if this witness wants to discuss the Barreto report as to its accuracy or what not, that is within the scope of Your Honor's ruling, but to have independent testimony as to what he did and what he found is part of the case in chief.

Mr. Howard: Respondent's witnesses were allowed to testify as to what they had done as a matter of custom and practice and general practice on these tests, and whether they considered them sufficient or not. We say that is the first time we had any issue to meet.

The Court: How long do you think it will take to do this?

Mr. Howard: Fifteen minutes, without interruption.

The Court: You may have fifteen minutes from now on direct examination of this witness on those lines.

Q. What amount, if any, of sodium chloride would be found in samples of flour contaminated by fresh water?

A. A very negligible amount. [348]

Q. Have you recently made comparative tests on samples of flour contaminated by fresh and salt water? A. Yes, sir.

Q. Will you describe the test you made, please?

A. Samples of flour were tested as received for their chloride content and their sodium content, tests

(Testimony of Francis P. Owens.)

were performed by the sodium flame procedure and by the Volhard procedure and by spectrographic procedure. Samples of fresh water and salt water were tested in the same manner. Samples of the flour then had added to them definite quantities and equivalent quantities of fresh water and salt water and were run through the same test for the purpose of determining whether or not there was a significant difference between flour wetted with salt water and flour wetted with fresh water. That in general was the scope of the test.

Q. What was the result of your test, the silver nitrate Volhard process, as to the difference in the presence of sodium and chloride in fresh water contaminated samples of flour and salt water contaminated samples of flour?

Mr. Wakefield: May it be understood my objection goes to all those questions?

Mr. Howard: No objection.

The Court: It is so understood and approved by the Court.

A. There was a very definite difference in the results. [349]

Q. Can you state that in terms of how many times more or less of the chlorides were found in one sample than the other?

A. With the samples employed, there were approximately 78 times, I believe it was, as much difference between the sample wetted with salt water as compared with the sample wetted with fresh water.

(Testimony of Francis P. Owens.)

Q. 78 more times? A. Yes, sir.

Q. What was the result insofar as the sodium flame test was concerned?

(Photograph marked Libellant's Exhibit 5 for Identification.)

Q. Did you understand the question?

A. Yes, sir. On the sodium flame test with flour itself, the test was insignificant in that there was merely a slight indication of the presence of sodium, while with flour wetted with fresh water, the results were relatively the same, and flour wetted with salt water, there was a very positive evidence of sodium.

Q. Did you then make some spectrographic tests of that sodium content?

A. Yes, sir. The flours as treated were then subjected to spectrographic analysis, and spectrographic analysis being capable of being recorded so that the results can be [350] observed visually, further demonstrated the fact that sodium in flour wetted with salt water is much more prevalent than in flour wetter with fresh water.

Q. Handing you what has been marked for identification as Libellant's Exhibit 5, can you state what that is?

A. Yes, sir. This is a photograph of the film that was gotten in our spectrographic analysis, in the testing of these samples for the sodium content.

Q. Does the film represent two different wave lengths for sodium? A. Yes, sir.

(Testimony of Francis P. Owens.)

Q. Will you point out to the Court and counsel the sample that represents flour contaminated with fresh water on the film?

Mr. Wakefield: If the Court please, I hate to interrupt again, but I must because this is objectionable on another ground. This certainly is new direct evidence of tests made by this man where he is purporting to produce his results without any showing that the conditions were in any respect the same as in our case, how much salt water, what density of salt water, what kind of flour, where did it come from.

He speaks of the spectrograph being used. There is no evidence in this case that Dr. Barreto or any of the persons who examined the damaged flour in this case [351] used a spectrograph. This is purely speculative, highly prejudicial to the issues in this case, to take a test run by a man which is not relevant to the facts here. That was the basis of counsel's objections to many of my questions this morning. I submit it is incompetent and highly improper rebuttal.

Mr. Howard: This witness has testified that the amount of sodium chloride does not vary greatly in different grades and qualities of wheat flour, and I submit with the evidence in the record that Dr. Barreto made both qualitative and quantitative tests, that this evidence is certainly in point to determine the comparative results, and to corroborate the evidence that was given by the witness and which is contradicted on respondent's case.

(Testimony of Francis P. Owens.)

The Court: The objection to this exhibit is sustained. You can ask him within the scope of the Court's previous allowance. Ask him to state oral answers to oral questions, but the objection to this exhibit is sustained.

Mr. Howard: I offer this exhibit in evidence at this time, Your Honor.

Mr. Wakefield: It is objected to.

The Court: Sustained. It is without prejudice to your asking oral questions and obtaining oral answers [352] in the scope that has previously been mentioned.

Q. State whether or not it is true that flour wetted with fresh water would contain about the same amount of sodium chloride as present in good wheat flour? A. It would.

Q. Do you consider that it is necessary to make a quantitative rather than a qualitative analysis of wheat flour to determine whether the contamination is by fresh or salt water? A. I do not.

Q. Why not?

A. The presence of sodium in any significant quantity or chlorine in any significant quantity, when calcium, magnesium and sulphates are likewise present—the presence of sodium and chlorine, when accompanied by the presence of calcium and magnesium and sulphates in significant quantities definitely demonstrates that the contamination is from an extraneous source and is not indicative of fresh water, but rather indicative of salt water.

Q. Do you consider laboratory testing of flour

(Testimony of Francis P. Owens.)

samples qualitatively by the Volhard silver nitrate test for chlorides and the flame test for sodium as reliable on the question of whether there has been salt water contamination?

A. I feel that they are.

Q. Did the tests made by you on other samples of flour [353] by the procedures which we have just mentioned confirm or contradict the findings and conclusions of Dr. Barreto as you have read them in his report and in his deposition?

A. They confirmed his findings.

Q. In your opinion, based on your experience, would Dr. Barreto have obtained the same results if samples wetted by fresh water had been tested?

A. No.

Mr. Howard: I have no further questions.

Cross-Examination

By Mr. Wakefield:

Q. In attempting to determine the presence of sea water, do you look for any certain quantity of sodium chloride in a commodity?

A. It depends upon the commodity that is being tested.

Q. Flour?

A. No, I don't feel it is necessary to determine the quantity when wheat flour is being tested.

Q. Where is the breaking point between the maximum normal quantity possible and that which has been contaminated by salt water?

A. In flour that had nothing in it at all, you

(Testimony of Francis P. Owens.)

mean? Well, with respect to sodium, the sodium content of flour is negligible. By that I mean maybe from one-hundredth of [354] a per cent to none at all, and with respect to chlorine, it varies between a trace to one-hundredth of a per cent for chlorine itself.

Q. So it is possible in undamaged natural flour, in some instances, to find both sodium and chlorine, is that correct?

A. In insignificant quantities.

The Court: That is undamaged by sea water, do you mean in your question?

Mr. Wakefield: Yes, sound flour.

Q. If you come up with a finding that it is sea water and you haven't used a quantitative test at all, how do you do that, by looking at the flame?

A. That's right. With the flame test and with the silver nitrate test, you can tell by the results of the test itself whether it is an insignificant quantity or if there is enough there to amount to something and indicate a result.

Q. But in your chemical work, isn't the constituency of sea water, that is, the sodium chloride in sea water, of a definite percentage?

A. It is relatively stable as far as the salts content is concerned throughout the world, yes.

Q. Do you think you could tell that necessary percentage merely by looking at the flame?

A. I don't say I could tell a percentage, but I do say [355] I could tell whether or not it was fresh water or salt water that caused the contamina-

(Testimony of Francis P. Owens.)

tion, by the difference in density of the test.

Q. Are you including in your calculations the possibility of other sources of contamination of sodium chloride?

A. I am basing my opinion on the presence of the accompanying sulphates, magnesium and calcium.

Q. In other words, the traces of magnesium and calcium indicate what?

A. They further substantiate the likelihood that it is salt water.

Q. Do you mean to testify that there is no calcium or magnesium in sound flour?

A. No, I do not.

Q. There is calcium and magnesium in sound flour?

A. There is, but it isn't in the water soluble form.

Q. In your business, if you were asked to give an opinion with respect to contamination of flour as to its cause or source of contamination, would you feel justified in giving an opinion that it was sea water without making a quantitative analysis?

A. If the——

Q. Not "if," just would you?

Mr. Howard: I think the witness should be allowed [356] to answer before counsel interrupts him.

Mr. Wakefield: I think he can answer that yes or no.

The Court: I think so.

(Testimony of Francis P. Owens.)

The Witness: May I hear the question again?

(Last question read by reporter.)

The Witness: I would.

Q. In Dr. Barreto's report, which you say you have examined, based upon what you see in that report, namely, his statement, "The analysis made on two samples of wheat flour * * *," with the marks so and so, "gave the following result," and he lists "Chlorites * * * Presence, Sulfates * * * Traces," and so on, would you say from that report Dr. Barreto had made a quantitative analysis?

A. No, sir.

Q. He did not make a quantitative analysis?

A. Not on the basis of what that says, no.

Mr. Wakefield: That is all.

Redirect Examination

By Mr. Howard:

Q. But you are aware of the fact that in his deposition he stated he did make a quantitative analysis?

Mr. Wakefield: I object to that as not proper redirect. [357]

The Court: Overruled, but the form of it is wrong. You can ask him if he was so aware.

Q. Are you aware of that? A. Yes, sir.

Mr. Howard: No further questions.

Mr. Wakefield: That is all.

The Court: Step down.

(Witness excused.)

Mr. Howard: That is all the libelant has in rebuttal, Your Honor.

The Court: Libelant rests. Is there anything further?

Mr. Wakefield: Nothing from respondent, Your Honor.

The Court: Libelant rests and respondent rests. I will hear counsel in their arguments of the matter beginning at 9:30 o'clock Saturday morning of this week. Those connected with this case are excused until that time.

(At 2:15 o'clock, p.m., Wednesday, November 2, 1949, proceedings adjourned until 9:30 o'clock, a.m., Saturday, November 5, 1949.)

November 5, 1949

The Court: Are counsel ready to proceed?

Mr. Howard: Yes, Your Honor.

Mr. Crutcher: Yes, Your Honor.

(Arguments made by counsel on behalf of libelant and respondent.)

Court's Decision

The Court: The evidence seems to the Court to be complete from the point of view of the theory of each side. There is no dispute as to the quantity of goods shipped. That is made certainly to appear in the statements in the bills of lading. The only question is concerning the cause of the claimed damage and as to the amount in terms of dollars or cruzeiros of the damage.

The libelant by a preponderance of the evidence has established and the Court finds, concludes and decides therefrom that the goods consisted of sacks of flour were received by the respondent on board its steamship Sweepstakes at New York for shipment to Rio de Janeiro in apparent good [359] order and condition, and that the flour was also in actual good condition at the time it was so received by the defendant carrier. Such actual good order and condition is established by the testimony of the mate, who testified that, while he came aboard the ship after the loading onto the ship had commenced, he did observe the condition of the goods after he came aboard sufficiently to determine and he did determine that the goods appeared to be in good order and condition.

The Court so finds that the goods were discharged at Rio de Janeiro in bad order and condition as claimed by libelant, and that the cause of such bad order and condition and damaged condition as claimed by libelant was in the nature of sea water damage, and that such sea water damage was caused to the goods while they were in the possession of the respondent as carrier of the goods.

The Court so finds that the damage was on account of sea water contact with the goods while in the possession of the carrier, because the only opportunity disclosed by the evidence for sea water contamination was while the goods were in the possession of the carrier on board the ship in transit from New York to Rio de Janeiro. There is dis-

closed by the evidence no other possibility of sea water contamination.

There is no positive eyewitness proof that, between [360] the time of taking the goods aboard the vessel at New York and the discharge of the goods from the vessel at Rio de Janeiro, they were actually brought in contact with sea water, but it is possible that from some cause unknown during the voyage the sea water was permitted to contact the goods either by passage in and about the deck and stowage place on the vessel while the sea water was in liquid form as water, or by coming aboard in and about the cargo stowage space in the form of ocean spray. These possibilities are inferences from the fact that the ship made a voyage from New York to Rio de Janeiro with these goods on board after they were received on board in apparent and in actual good condition, and from the fact that no other possibility for contact of sea water with the goods was indicated by the evidence.

The Court believes that by the communication dated the 2nd of March, following the commencement of discharge of the cargo at Rio de Janeiro on February 21st, the respondent had as good an opportunity to make an analysis of the damage as did the libelant. The Court has no doubt of the correctness of the fact as to the nature of the damage as found by libelant's witness, Dr. Barreto. Everything connected with his deposition points to unquestioned credibility of his testimony, and I see no fact or proper inference of fact which to my mind

would tend to dispute or undermine the [361] truthfulness of his statements as to cause of damage.

I do not find any fact or circumstance in the evidence as to what occurred from the time of discharge of the goods from the vessel until their arrival at the libelant's warehouse or mill which would give rise to or establish or tend to prove that the goods were damaged by sea water or were damaged at all while being unloaded from ship to dock and/or while being transferred from dock to libelant's mill or warehouse.

By reason of all of these things mentioned by the Court, and from a preponderance of all the evidence, the Court finds, concludes and decides that the goods were damaged, as alleged, by the respondent, more specifically by respondent's improper care of the goods while they were in transit, and that the damage was caused by the respondent's negligently permitting the goods to be contacted by sea water while the goods were in transit on board the respondent's vessel Sweepstakes from New York to Rio de Janeiro.

The Court further so finds, concludes and decides that the extent and amount of the damage which the libelant has sustained by reason of the salt water damage to the goods is approximately in the amount claimed by libelant, the detail of which the Court asks counsel to consider between now and the date to be fixed by the Court for settling and [362] entering of findings of fact, conclusions of law and decree, and if on that date counsel cannot between

themselves agree as to what is the proper amount of the damage, then the Court will on that date fix the specific amount of such damage.

Mr. Crutcher: Is Your Honor fixing 35 per cent or 40 per cent?

The Court: The Court fixes 35 per cent as the depreciation in the condition and value of the goods.

(At 11:10 o'clock, a.m., Saturday, November 5, 1949, trial proceedings concluded.)

Certificate

I, Patricia Stewart, do hereby certify that I am official court reporter for the above-entitled court, and as such was in attendance upon the hearing of the foregoing matter.

I further certify that the above transcript is a true and correct record of the matters as therein set forth.

/s/ PATRICIA STEWART,
Official Court Reporter.

[Endorsed]: Filed January 17, 1949. [363]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO APOSTLES ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to designation of proctors for appellant I am transmitting as the Apostles on Appeal in this cause all original pleadings, depositions, documents, and testimony, together with libelant's offered exhibits number 1 to 5, inclusive, and respondent's offered exhibits numbered A-1 to A-4, inclusive, and that said original pleadings, depositions, documents, testimony and exhibits constitute the Apostles on Appeal from the Decree filed and entered on the Admiralty Docket on November 14, 1949, to the United States Court of Appeals for the Ninth Circuit, to wit:

1. Libel.
2. Libelant's Stipulation for Costs.
3. Proof of Service.
4. Appearance of Proctors, for Respondent. (U. S. Attorney.)
5. Appearance of Proctors for Respondent. (U. S. Attorney by Bogle, Bogle & Gates.)
6. Answer and Interrogatories, of Respondent.
7. Interrogatories Propounded by Respondent to Libelant.

8. Exceptions to Answer.

9. Objections to Interrogatories Propounded by Respondent to Libelant.

10. Notice of Hearing Libelant's Exceptions to Answer, and Libelant's Objections to Interrogatories Propounded by Respondent to Libelant.

11. Order Upon Exceptions of Libelant to Answer of Respondent.

12. Order Upon Exceptions to Respondent's Interrogatories.

13. Libelant's Answers to Respondent's Interrogatories.

14. Deposition of Howard Francis Lane, behalf respondent.

15. Deposition of Anthony Parsons, behalf respondent.

16. Depositions of A. Barreto, C. S. Botelho and John Doe Truckman, behalf libelant, and A. M. Caswell and John Doe Customs Guard, behalf respondent, with stipulations for taking attached.

16a. Letter, Department of State, transmitting above depositions to Clerk, U. S. District Court.

17. Stipulation re introduction in evidence of Bills of Lading No. 37 and No. 74.

18. Notice of Hearing Libelant's Motion to Require Respondent to Produce.

19. Libelant's Motion to Require Respondent to Produce.

20. Order on Libelant's Motion to Require Respondent to Produce Documents.

21. Deposition of Percy W. Punnett, behalf respondent.

22. Libelant's Motion for Order Limiting Issues to be Tried or, in the Alternative, for a Continuance of the Trial Date.

23. Notice of Hearing above motion.

24. Depositions of Frederick Albert Cal Rols Herold, et al.

25. Trial Brief of Libelant.

26. Respondent's Trial Brief.

27. Libelant's Supplemental Memorandum of Points and Authorities.

28. Respondent's Supplemental Memorandum of Points and Authorities.

29. Notice of Taxation of Costs Against Respondent.

30. Libelant's Memorandum of Costs and Disbursements.

31. Notice of Presentation of Findings of Fact, Conclusions of Law, and Decree.

32. Findings of Fact and Conclusions of Law.

33. Decree, for Libelant, filed November 14, 1949.

34. Court Reporter's Transcript of Court's Decision.

35. Court Reporter's Transcript of Proceedings at Trial.

36. Petition of Respondent U.S.A. for Appeal.

37. Order Granting Petition for Appeal.

38. Notice of Appeal.

39. Assignment of Errors by Respondent U.S.A.

40. Citation on Appeal.

41. Acknowledgment of Service of Petition for Appeal, and Assignment of Errors.

42. Designation of Apostles on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of said District Court at Seattle, this 16th day of March, 1950.

MILLARD P. THOMAS,
Clerk.

[Seal] By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 12510. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Cia. Luz Stearica, a Corporation, Appellee. Apostles on Appeal. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed March 23, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

Cause No. 12510

THE UNITED STATES OF AMERICA,
Appellant,
vs.

CIA. LUZ STEARICA, a Corporation,
Appellee.

APPELLANT'S STATEMENT OF POINTS
ON APPEAL AND DESIGNATION OF
PARTS OF THE APOSTLES

Comes now the appellant and herewith files in this court its Statement of Points upon which appellant intends to rely on appeal and designates the Apostles on Appeal necessary for the consideration and determination thereof pursuant to Rule 19(6) of the rules of this court (as amended, effective January 1, 1949), as follows:

1. Appellant adopts its Assignment of Errors in this cause as heretofore filed in the United States District Court for the Western District of Washington, Northern Division, in this cause in connection with the appeal and as included in the Apostles on Appeal as the Statement of Points upon which appellant intends to rely upon appeal.

2. Appellant designates the following portions of

the Apostles on Appeal as material to the consideration of the appeal:

Clerk's

Number

Item

1. Libel.

6. Answer.

7. Interrogatories propounded by respondent—4 and 17 only.

13. Libellant's answers to respondent's interrogatories—paragraphs III and XII only.

11. Order upon exceptions of libellant.

19. Libellant's motion to require respondent to produce—paragraphs (5) and (8) only.

20. Order on libellant's motion to require respondent to produce documents.

32. Findings of fact and conclusions of law.

33. Decree.

35. Transcript, except the following portions not material on this appeal, or repetitions: p. 4, line 14, through p. 5, line 5; p. 24, line 23, through p. 27, line 6; p. 48, line 13, through p. 50, line 3; p. 92, line 4, through p. 94, line 6; p. 125, line 19, through line 23; p. 127, line 18, through line 22; p. 166, line 18, through p. 168, line 13; p. 220, line 2, through line 21; p. 229, line 2, through line 11; p. 245, line 8, through line 25; p. 271, line 7, through p. 273, line 5; p. 296, line 8, through p. 300, line 10.

36. Petition for appeal.

37. Order granting petition.

38. Notice of appeal.

39. Assignment of errors.

40. Citation on appeal.

Libelant's Exhibits 1, 2, 3, 4; Respondent's Exhibits A-1, A-2, A-3, A-4.

J. CHARLES DENNIS,
United States Attorney.

BOGLE, BOGLE & GATES,
CLAUDE E. WAKEFIELD,
/s/ M. BAYARD CRUTCHER,
Of Counsel.

Proctors for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed March 24, 1950.

[Title of Court of Appeals and Cause.]

MOTION TO OMIT PRINTING OF EXHIBITS

Comes now the appellant herein and moves that the exhibits offered in evidence upon the trial of this cause, and designated as material to consideration of the appeal, be omitted from the printed record to be prepared herein, and that they may be used in their original form.

As reasons therefor, appellant respectfully shows to the court that libelant's Exhibits 3 and 4 are reproduced in the transcript (Clerk's number 35, at pp. 27, 28, 56); that libelant's Exhibits 1 and 2, and respondent's Exhibits A-1, A-2, A-3 and A-4

are not conveniently printable; that their inclusion in the record would be cumbersome and impractical in the premises; and that the substance of all of the exhibits and the material facts established by said exhibits appear otherwise in the testimony of the witnesses in the transcript of the proceedings.

J. CHARLES DENNIS,
United States Attorney.

BOGLE, BOGLE & GATES,
CLAUDE E. WAKEFIELD,
/s/ M. BAYARD CRUTCHER,
Of Counsel,

Proctors for Appellant.

It Is So Ordered, this 24th day of March, 1950.

/s/ WILLIAM HEALY.

/s/ HOMER BONE.

/s/ WALTER L. POPE.

Receipt of copy acknowledged.

[Endorsed]: Filed March 27, 1950.

No. 12510

IN THE
UNITED STATES
COURT OF APPEALS

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

CIA. LUZ STEARICA, a Corporation
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT
UNITED STATES OF AMERICA

J. CHARLES DENNIS,
United States Attorney.

BOGLE, BOGLE & GATES,
CLAUDE E. WAKEFIELD,
M. BAYARD CRUTCHER
(Of Counsel)

Proctors for Appellant.

603 Central Building,
Seattle 4, Washington.



FRAYN PRINTING COMPANY

PAUL P. O'BRIEN,
CLERK

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CLAUDE E. WAKEFIELD,
M. BAYARD CRUTCHER
(Of Counsel)

Proctors for Appellant.

603 Central Building,
Seattle 4, Washington.

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IN THE
UNITED STATES
COURT OF APPEALS

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

CIA. LUZ STEARICA, a Corporation
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT
UNITED STATES OF AMERICA

I.

STATEMENT OF JURISDICTION

This is a case of alleged sea water damage to cargo—sacks of flour.

The consignee, as owner of the goods, brought this action in admiralty against the United States, as owner and operator of the carrier vessel. Its libel was filed in the United States District Court for the Western District of Washington, Northern Division, less than two years after the goods were

delivered. The libelant alleged that if the vessel were privately owned or operated a proceeding in admiralty could be maintained against the ship, in rem, and against her owner, in personam. (Aps. 2) Facts essential to jurisdiction of the United States District Court under the Suits in Admiralty Act (46 USC, §742 et seq.) were admitted in the answer. (Aps. 6)

The court's decree awarded the consignee damages against the United States in the sum of \$6,774.42, together with interest and costs. (Aps. 32) The United States appeals from that decree by petition for appeal, duly granted (Aps. 33, 34), as required by this court (Admiralty Rule 33), and by notice of appeal (Aps. 36), as required by statute (28 U.S.C., §2107). This court has jurisdiction thereof. (28 U.S.C., §1291).

II.

STATEMENT OF THE CASE

This action deals with a shipment of 10,500 bags of flour carried from New York to Rio de Janeiro aboard the motorship "SWEEPSTAKES" in February, 1946. The consignee, Cia Luz Stearica, claims that 3,087 of these bags were badly wetted with seawater when received by rail at its warehouse in Brazil. It seeks to hold the United States liable therefore, as owner and operator of the ship. The

United States denies that the flour was wet at all when discharged.

The questions involved in the trial of the case and presented by this appeal are:

A. WHETHER THE FLOUR WAS WET WHEN IT WAS DISCHARGED FROM THE "SWEEPSTAKES" AT RIO de JANEIRO.

This issue was raised in the pleadings (Libel, par. VIII, Aps. 4; Answer, par. V, Aps. 7), and evidence offered thereon by the parties, as will be discussed hereafter. The District Court found that the flour was wet from seawater when discharged, by reason of some cause unknown and resulting from unspecified negligence on the part of the appellant, as carrier. (Findings of Fact VI, VII, Aps. 27, 28)

We contend that the evidence does not support such findings.

B. WHETHER EXPERIENCE OF THE VESSEL ON THE PRECEDING AND SUCCEEDING VOYAGES IS RELEVANT TO THE ABOVE ISSUE.

This issue was raised upon offers of evidence by appellant, objected to by appellee. Details are summarized in assignment of error 10. (Aps. 38) We contend that in the circumstances the district court improperly excluded this proof.

C. WHETHER THE VESSEL'S AGENTS WERE GIVEN NOTICE OF A SURVEY OF THE ALLEGED DAMAGE.

This issue was raised by conflicting contentions

of counsel. In response to appellant's interrogatory on this point (No. 9, Aps. 12), appellee submitted as purported notice of survey a letter (par. VII, Aps. 17; Exhibit, Aps. 19; translation, Aps. 64). The Court deemed that this afforded appellant as good an opportunity to make an analysis as the appellee (opinion, Aps. 356), and held that this was in effect a notice of survey (Finding of Fact X, Aps. 29). We contend that it was not.

D. WHETHER (assuming the flour was wet on discharge) THE FLOUR WAS DAMAGED BY WETTING TO THE EXTENT OF 35% OF ITS SOUND MARKET VALUE AT DESTINATION.

This issue was raised by conflicting evidence as to the actual damage suffered, as will be discussed hereafter. The Court found that the flour was damaged to this extent. (Findings of Fact VIII, IX, Aps. 28). We contend that the evidence was insufficient to support the finding.

E. WHETHER THE PROFERRED EVIDENCE OF MARKET VALUE OF THE FLOUR AT DESTINATION WAS COMPETENT OR ADMISSIBLE.

This issue was raised by appellee's offer of certain testimony as to price, objected to by appellant because it was stated to be recollection and belief, and because the witness failed to furnish a copy of the record or published price list, as requested by cross-interrogatory. (Aps. 121, 126 et seq.). The court overruled the objection for reasons stated at

Aps. 133, 134. Its opinion allowed recovery in full at the figure given in this testimony (Aps. 357), but appellee voluntarily submitted a finding based upon the smaller figure stated in answer to interrogatories (Finding of Fact IX, Aps. 28).

Appellant contends that damages in any event should be calculated upon the basis of landed cost, as the only competent evidence of value (answer to Interrogatory 22, Aps. 122; Aps. 132).

III.

ASSIGNMENTS OF ERROR RELIED UPON

Appellant relies upon each of the errors assigned at time of appeal (Aps. 37 et seq.), and adopted in its statement of points on appeal (Aps. 363, par. 1).

These may be conveniently grouped under the questions above stated, as follows:

- A. **WHETHER FLOUR WAS WET WHEN DISCHARGED OR SHIP NEGLIGENT.** Assignments 1, 2, 3, 4 (Aps. 37), 11 (a), (b), (e) (Aps. 40) and 12 (Aps. 41).
- B. **WHETHER PRIOR AND SUBSEQUENT EXPERIENCE OF VESSEL WAS RELEVANT.** Assignment 10 (Aps. 38).
- C. **WHETHER THERE WAS NOTICE OF SURVEY.** Assignment 9 (Aps. 38).
- D. **WHETHER IT WAS DAMAGED TO EXTENT CLAIMED.** Assignments 5 (Aps. 37), 6, 8 (Aps. 38), 11(c), (d), (e) (Aps. 40), 12 (Aps. 41).
- E. **WHETHER THERE WAS COMPETENT EVIDENCE OF MARKET VALUE.** Assignments 7, 8 (Aps. 38(1), 11(d) (Aps. 40), 12 (Aps. 41).

IV.

APPELLANT'S ARGUMENT

A.

WAS THE FLOUR WET FROM SEAWATER WHEN DISCHARGED FROM THE SHIP? WAS THE SHIP NEGLIGENT WITH RESPECT THERETO?

The errors assigned are:

"1. That the Court erred in finding that the libelant's shipment of flour was delivered by respondent to libelant at Rio de Janeiro in a damaged condition (Findings of Fact 6, 7 and 8) (Aps. 37)

"2. That the Court erred in finding that said shipment of flour was damaged by sea water at the time of discharge from the vessel and when delivered to libelant. (Aps. 37)

"3. That the Court erred in finding that any damage to said flour by sea water or damage from any other cause was proximately caused by respondent's negligence or improper care of said cargo, or was caused by respondent at all. (Findings of Fact 7 and 8). (Aps. 37)

"4. That the Court erred in finding that there was a competent or sufficient chemical analysis of said damaged flour as a basis for a determination of salt water contamination. (Findings of Fact 8.) (Aps. 37).

"11. That the Court erred in making and entering Conclusions of Law 1 and 2 in that there was no proof or sufficient proof—

"(a) That respondent was responsible or liable for any damage;

"(b) That respondent was negligent in any respect;

"(e) That the evidence was insufficient to establish respondent's liability at all and was

insufficient to establish any basis of damage as to the extent thereof or the value thereof. (Aps. 40).

"12. That the Court erred in entering a Final Decree on November 14, 1949, in favor of libelant in the sum of \$6,774.42 plus interest and costs, or in any other sum, in that under the evidence before the Court and the evidence improperly excluded by the Court, libelant failed to prove its case and Decree should have been entered in favor of respondent dismissing the libel and awarding respondent its costs." (Aps. 41).

We would first point out that upon the issue whether the flour was wet when discharged appellee had the burden of proof. The libel alleged it was wet when delivered. (Aps. 4). The answer denied the allegation. (Aps. 7). This is not the *Folmina*, 212 U.S. 354, 53 L. ed. 546, 29 S.Ct. 363, where the goods were known to be wet on discharge.

It is the duty of the complaining party to prove its case by a fair preponderance of the evidence, and this is a factor in considering the scope of the review. *The Cleary Bros.* No. 61 (CA, 3), 61 F. (2d) 393, 395.

Second, this is an appropriate case for appellate review of the evidence. All of the essential evidence is in depositions and exhibits—the stowage data and log; the testimony of those present at the discharge, Parsons, Lane, Caswell and Luiz; the content of the records on discharge; the testimony of

those who later saw the flour at appellee's mill, Ferreira, Ramos, Barreto. Under the rule of *The Ernest H. Meyer* (CA, 9), 84 F.(2d) 496, cert. den. 299 U.S. 600, the usual presumption in support of the lower court's findings "is of lesser weight and more easily may be rebutted." (501) Evidence is not weighed to determine whether a *part* of the evidence warrants an inference supporting the finding. The Court "must weigh *the whole evidence*." (500)

To the same effect, among other cases, is *The Diamond Cement* (CA, 9), 95 F.(2d) 738, 740.

Third, a basic consideration for giving weight to lower court findings is missing. There is no conflict in the evidence upon the important facts. *Reiss S. S. Co. v. Great Lakes Towing Co.* (CA, 8), 177 F. (2d) 681, 682, 683; *Portland Tug & Barge Co. v. Upper Columbia R. Tow. Co.* (CA, 9), 153 F. (2d) 237, cert. den., 328 U.S. 863.

Fourth, the theory adopted by the trial court is improbable. It runs counter to common experience in sea commerce. It supposes that a large number of big flour sacks were wet with sea water as they passed through the hands of longshoremen, past the eyes of tallymen and customs men and ship's officers, without any of them seeing or feeling the wetness, without any other consignee's flour getting wet, or any other cargo getting wet, or any trace

of water being left on the dunnage or dunnage paper, or showing in the ship's bilges.

This is another consideration affecting the scope of review. As Judge Learned Hand remarked for the court in *Bellhaven* (CA, 2), 72 F.(2d) 206, 207:

"We are indeed not ordinarily given to reversing the district court upon an issue of fact, though of course we have an eventual responsibility for the facts as well as for the law. But there are a number of considerations which take this case out of the ordinary rule. The judge did not see any of the *Bellhaven's* witnesses except the pilot; and he was not so much impressed as we cannot help being by the absurdity of their story on its face. * * *"

The goods in question, 10,500 bags of wheat flour, of 50 kilograms (110 pounds) each, were loaded aboard the Appellant's motorship "SWEEPSTAKES" at New York City, at the end of January, 1946, for carriage to Rio de Janeiro, Brazil, and delivery to Appellee.

(1) CHARACTER OF VESSEL

The "SWEEPSTAKES" is a Wilmington-type C-2, a modern fully-welded cargo vessel of five holds, with forced-draft ventilation from the top of the king posts, and steel pontoon hatch covers on the weather decks. (Aps. 139, 194, 144)

(2) LOADING AT NEW YORK

At time of loading three tiers of criss-crossed dunnage were laid on the floor of each hold where

this flour was stowed, bottom tiers being laid fore and aft to allow drainage of water into the scuppers. Heavy dunnage paper was laid over this, and over other exposed wood and metal, to protect the sacks. (Aps. 151, 152, 192, 193, 206, 209) Cargo battens covered all longitudinals and stringers. (Aps. 153) The flour consigned to Rio de Janeiro was stowed in Nos. 1, 2, 3 and 4 'tween decks, and No. 4 lower 'tween deck—top stowage, so-called, for quick discharge as priority cargo. (Aps. 50, 154) It included appellee's shipment and 2,315 sacks consigned to others. (Libelant's Exhibit 2)

There was no rain during loading. (Aps. 155, 156, 193)

The hatch tallies show that 1,965 bags of consignee's flour were loaded on January 28. The balance was loaded on or after January 31, when Chief Officer Parsons joined the vessel. (Aps. 51)

The Chief says that at that time he inspected the cargo gear and hatches, went down in all the hatches, and

"as far as I can recall everything appeared in order, ample dunnage was laid and the cargo seemed to be coming aboard in good condition and being properly stowed at the time. (Aps. 51, 52)

"Q. (by Mr. Lord). Did you find any moisture or dampness or water in the hatches at that time?

A. No, there was no indication of that."
(Aps. 52)

The Chief examined each hold personally. (Aps. 206, 207) At the conclusion of loading, the vessel's weather hatches were battened down. Three new tarpaulins, each inspected and found without tears or defects, were laid properly over each hatch cover, and fastened with strongbacks. (Aps. 147, 159, 194) Ventilation blowers were put in operation. (Aps. 159)

(3) THE VOYAGE

Captain Lane, master of the SWEEPSTAKES, was asked to characterize the voyage between New York and Rio de Janeiro. He replied:

“A typical South American voyage such as I have experienced for the last eight years: quiet, moderate breeze, moderate seas.” (Aps. 157)

The log book for the voyage was in the hands of counsel and the witness during the taking of this deposition, and was briefly reviewed. (Aps. 159 et seq.) It is an exhibit. Nothing which would contradict this generalization appears.

The ship was light-loaded, about two feet above her marks. (Aps. 180)

The first port of call was Trinidad, where the vessel arrived on February 9. (Aps. 159) It discharged mail from No. 5 hatch (Aps. 160, 194), took bunkers, and departed on the same day. (Aps. 159, 160)

The "SWEEPSTAKES" arrived at Rio de Janeiro, its next port of call, on February 19. (Aps. 160) On the following day, it docked at a deepwater berth. (Aps. 162)

(4) DISCHARGE AT RIO

Discharge of cargo commenced on February 21. (Aps. 160, 161) The flour to consignee and others was discharged under mixed marks. (Aps. 217) The flour was loaded onto open flat cars (Aps. 162, 55), at which time it was tallied by customs men (Aps. 162, 221), Moore - McCormack tally clerks (Aps. 221) and dock tally clerks. (Aps. 221) A ship's officer was on deck at all times. (Aps. 208)

There were occasional rains during unloading, but during these periods discharge ceased and hatches were covered. This is general practice, and is required by customs. (Aps. 161, 197, 198, 225)

Discharge of all cargo was completed on the morning of the 25th (Aps. 161, 198), although it appears that unloading of this flour—priority cargo—was completed on the 23rd. (Aps. 217)

The cars were provided by the docks administration on behalf of consignee. (Aps. 219)

(5) CUSTOMS REQUIREMENTS

At this point it will be helpful to the court if we deviate from the chronological summary, and mention the pertinent Brazilian laws and regula-

tions bearing on notation of damage.

The evidence is that of a lawyer, Dr. Braz de Camargo, in practice in Rio de Janeiro and familiar with the laws and regulations of Brazil related to customs. (Aps. 323 et seq.) Appellee offered no proof to contradict it.

(a) Decree n. 355 A of 25th April, 1890, Art. 11, provides as follows:

“Article 379. The longshoreman foreman, his assistants, warehouse keepers, and guards attending discharge and in charge of organizing records are responsible for pointing out all packages turning up damaged, broken, re-nailed, or in any way damaged, this circumstance also to be noted on discharge sheets, the necessary declarations being noted down on the same day as packages are discharged.” (Aps. 324)

This law is superior to regulations of the respective port administrations, which cannot conflict with it. (Aps. 326) This law was in force in February, 1946. (Aps. 325)

(b) De Camargo testifies, based upon the customs law and regulations and his professional experience, that

“The Brazilian customs house officials are required to inspect all cargo discharged and make notation of any damage. The consignees generally insist on such notations since it is on said notations that the custom house duties are assessed.” (Aps. 327)

This is substantiated by his actual knowledge.
(Aps. 329)

Specifically, as to flour discharged at Rio in February, 1946, damaged by salt water, and stained and caked, de Camargo says:

"In my opinion, this condition would have been noted by customs house officials and even if his attention had not been drawn to such bags in the condition as described in Question No. 12, the representative of the consignee at the time of discharge would probably have called the attention of the official to it. It is doubtful that the official would not have noted the condition of the bags to avoid future doubts with reference to the duties." (Aps. 328)

(c) There is no deviation from this practice or requirement where priority cargo by-passes the customs warehouse. (Aps. 329) Inspection is made at dock side. (Aps. 329)

"If this was not done for certain cargoes, for which permission by special arrangement has been obtained, the officials would not be able to check that the duties have been properly paid." (Aps. 330)

An added incentive is that customs officials receive a percentage of the fines imposed on those who do not declare exactly the nature of the cargo.

"* * * It would be in the interest of the official to check any cargo, and, if shortlanded, fine the captain of the ship." (Aps. 330)

At this point, the following testimony of Captain Lane takes on added significance:

"Q. (by Mr. Lord). Were those bags discharged on to a pier or on to lighters?

A. No, being a priority cargo it was passed through customs and loaded on flat cars. CUSTOMS TALLIED THE CARGO AS IT WENT INTO THE OPEN FLAT CARS. THAT I OBSERVED MYSELF." (Aps. 162)

This casual remark, not in the context of the questioning then being made, bears the stamp of honest recollection and truth.

(6) THE RECORD OF DISCHARGE

Four witnesses saw portions of this cargo as it was discharged.

(a) *Chief Officer Parsons* made the most frequent inspections. His testimony is that he was on duty when the hatches were opened up, and that he "sighted the hatches, looked at the general condition of the cargo." (Aps. 195) His purpose was to see if there was any sweat damage. "It was a rather smooth voyage, there was no heavy weather damage or anything like that, so the only thing I looked for was any possibility of sweat. I did not observe any." (Aps. 195)

It will be remembered that this flour was stowed in the upper 'tween decks of Nos. 1, 2, 3 and 4 holds, and the lower 'tween decks of No. 4. Much of it was apparently in the square of the hatch. (Aps. 152)

During the course of discharge the Chief Officer

entered the compartments frequently to see if there was any damaged cargo. (Aps. 198, 209)

After discharge was completed he made a further inspection of each compartment, primarily to see if any cargo had been overlooked. (Aps. 198, 209)

It is of course common knowledge that the Chief Officer is responsible for the care of cargo. This is his customary duty, and it was Mr. Parson's duty on the "SWEEPSTAKES." (Aps. 213)

Mr. Parsons saw no water-damaged flour (211), received no report of any such damage (196), and saw no evidence of moisture or water in the holds. (Aps. 198)

Asked for his opinion whether it was possible for the flour to come into contact with salt water during the voyage, Mr. Parsons said:

I don't see how it could be possible. (Aps. 199)

(b) *Captain Lane* recalls observing the flour in No. 3 hatch. (Aps. 162) He neither knew of any damage to the flour discharged, nor received any report of any water damage whatever to any of the cargo. (Aps. 163, 164, 165, 189)

Such reports are made immediately (Aps. 163), as is the custom of ships. It was the Captain's duty to sign them and forward them to the claims and operating departments. (Aps. 164)

It was his belief that there was no possibility of

seawater having gotten into the cargo holds up to the time the ship reached Rio. (Aps. 184)

(c) *Caswell*, Brazilian claims agent for Moore-McCormack Navegacao S. A., testified that he was aboard the "SWEEPSTAKES" from time to time during discharge of this flour, and was familiar with the shipment. (Aps. 216, 217) He testified in response to written interrogatories:

"Employees from my department who are aboard checking tallies with manifests as discharge proceeds keep me informed. In addition, foremen, etc., have instructions to telephone me in case of serious damage coming to light; therefore, if the flour showed visible damage, my attention would normally have been called to it." (Aps. 217)

"I have no knowledge of any damage to this flour either by water or other form of damage visible at the time of discharge." (Aps. 218)

"Such damage would have come to my attention through the records in the customs house register and by verbal advice from stevedores and/or our own employees, as explained above." (Aps. 225)

"A customs house guard and dock tally clerk are responsible, together with our own tally clerk, for noting in official register the mark and weight of torn bags and/or mark and quantity of damaged bags; the procedure in reference to the flour ex S.S. "SWEEPSTAKES" did not differ from the usual procedure covering flour dispatched for delivery to consignee's deposit." (Aps. 221)

"To my knowledge no cargo carried on the S.S. "SWEEPSTAKES" on the voyage in ques-

tion was damaged by salt water. I have no record of any other damage except normal breakage through handling." (Aps. 225)

"I think it is extremely unlikely that any extensive water damage could have escaped my attention, the attention of the stevedores, tally clerks and docks and customs house personnel." (Aps. 229)

(d) One *Luiz*, checker, employed by the Rio de Janeiro Port Administration, testified to the removal of one wagon load of the flour. (Aps. 55) While his testimony is offered by appellee, there is nothing in it to indicate that the flour was in any way damaged at time of discharge.

The *written records* at the time of discharge flatly contradict consignee's claim.

(a) *Ship's records* — mate's report of damaged cargo (Aps. 163, 164, 196) and log book (Respondent's Exhibit A-1)—show neither the damage claimed nor *any* water damage. (Aps. 163, 164) Appellee demanded production of the cargo damage report (Aps. 21), but would not accede to its introduction in evidence. (Aps. 214, 215) The court rejected it. (Aps. 215)

(b) *Shore agent's records* show no water damage to any cargo carried on this voyage. (Aps. 225) The hatch tallies were demanded by appellee (Aps. 21) and produced. Appellee does not offer them in evidence, nor any tallies in its possession. The

world-wide custom of noting bad order on discharge tallies is one of which an admiralty court cannot fail to take cognizance.

(c) *Custom's records* show no damage whatever to this shipment (Aps. 80, 222), although the law requires such a record of any damage (Decree n. 355 A of 25th April, 1890, set out at page 13, *supra*; testimony of de Camargo, Aps. 323 et seq.; testimony of Caswell, Aps. 221). It was to consignee's definite advantage to have a record of same, to avoid unnecessary duty. (Aps. 327, 328) Appellee offers no evidence that customs ever acknowledged this shipment to have been in bad order when discharged.

(7) POSSIBLE SOURCES OF DAMAGE

At this point we approach the issue from another direction.

The trial court found that 3,087 bags of this flour were extensively damaged by seawater while aboard ship, and "That the sole proximate cause of the aforesaid damage was the negligence of the respondent, as carrier, in the *improper care* of said flour while in transit aboard the S.S. "SWEEP-STAKES" and in *negligently permitting the said flour to be contacted with salt water* while aboard the vessel. That there was no excuse for such negligence," etc. (Findings VI, VII, VIII, Aps. 27, 28, emphasis ours).

The court explains it this way:

“There is no positive eyewitness proof that, between the time of taking the goods aboard the vessel at New York and the discharge of the goods from the vessel at Rio de Janeiro, they were actually brought in contact with sea water, but it is possible that from some cause unknown during the voyage the sea water was permitted to contact the goods either by passage in and about the deck and stowage place on the vessel while the sea water was in liquid form as water, or by coming aboard in and about the cargo stowage space in the form of ocean spray. These possibilities are inferences from the fact that the ship made a voyage from New York to Rio de Janeiro with these goods on board after they were received on board in apparent and in actual good condition, and from the fact that no other possibility for contact of sea water with the goods was indicated by the evidence.” (Aps. 356)

What possibilities? We are not dealing with metaphysics. A vessel is a complicated creature, but she has certain well-known features and characteristics. An admiralty court is not justified in talking about possibilities “from some cause unknown,” when there is affirmative evidence in the case dealing with these features and characteristics of the ship.

a. *Water within the ship—deep tanks.* There were none. (Aps. 139, 148)

b. *Water within the ship—pipes.* Nos. 1, 2, and 3 'tween decks are clear of pipe lines.

The Captain was not certain as to Nos. 4 upper and

lower 'tween decks. (Aps. 183, 184) The Chief Officer testified that he inspected the sanitary pipes in the holds prior to sailing. (Aps. 207) The fact that bilge soundings were small and fairly constant suggested to the Chief Officer that there was no leakage of any kind. (Aps. 196) Captain Lane testified that the average reading was three to four inches and that there were no overflows on this voyage. (Aps. 179, 180)

c. Water within the ship—condensation.

Sweat was the only possible source of damage, in the opinion of the Chief Officer. (Aps. 195) To obviate this the ventilator blowers were turned on as soon as the hatches were battened down. The flour was protected by dunnaging, including paper, as previously outlined (page 9, *supra*). No sweat or evidence of sweat damage was observed. (Aps. 195, 198, 210, 211) In any event, it could not account for the damage claimed. (Aps. 209, 210)

d. Water outside the ship—open hatches.

It did not rain during loading operations in New York. (Aps. 155, 156, 193) Customary precautions to protect dry cargo in rain are described by Captain Lane, including particularly hatch tents and sling covers. (Aps. 157)

The hatches were battened down after loading was completed. (Aps. 159) The holds in question

were not opened at Trinidad. (Aps. 160, 194)

There was occasional rain at Rio during the discharge, but appropriate precautions were taken as to cargo aboard, as previously outlined (see page 12, *supra*).

e. Water outside the ship—hatch covers.

The vessel was equipped with modern steel pontoon hatch covers on the weather decks. (Aps. 144, 194) It had been outfitted with new tarpaulins (Aps. 147), and these were inspected by the Chief Officer when they were put in place (Aps. 184, 194) There were three to each hatch cover, and "they were put on properly." (Aps. 194) The covers were inspected by the Board of Underwriters of New York after they were fitted. (Aps. 184)

f. Water outside the ship—decks and sides.

It is conceded by appellee that this was a fully welded ship—that is, there were no rivets. (Aps. 144)

There is no evidence whatever to support a speculation that the ship's deck or shell plates were cracked or had holes in them.

For one thing, the damage as described by appellee's witnesses is not consistent with a flow of concentrated water, such as would come from a leak in a plate. (Aps. 272) For another, there would be a water flow to the scuppers. (Aps. 272) This

is wholly at odds with the bilge soundings recorded in the log.

The master testified that in his opinion, based upon his sea experience, the ship was in all respects seaworthy. (Aps. 180, 181) The Chief Officer similarly testified. (Aps. 199)

No heavy weather was encountered en route. (Aps. 196, 157, 195, 184) Captain Lane:

“Well, the ship was never loaded to capacity. All we would have is the spray, what you would normally get when bucking the trade winds from Trinidad up to Rio City.” (Aps. 180)

A large proportion of these sacks, in the four upper 'tween decks, was of course above the water line. A leak in the side cannot account for the damage, and again, is not reconcilable with the bilge soundings.

g. Water outside the ship—ventilators.

Both intakes and exhausts for ventilation were situated on top of the king posts. There were no cowl type ventilators. (Aps. 139)

The court inquired of the witness Gow, the only expert and independent marine surveyor in the case, whether the damage might not come from salt spray.

“A. * * * It could cover a small number of bags right under a ventilator, but there is *no chance* of its spreading out over a large area and affecting the number of bags that are represented here.” (Aps. 272, emphasis ours)

At this point Gow had not been asked to assume that the "SWEEPSTAKES" had the modern ventilating system previously described, without cowl type or deck ventilators. (Aps. 272, 273)

We find no other source of possible water damage suggested in the evidence. The court's resort to speculation as to the *possibility* of "some cause unknown" (Aps. 356) was not for want of evidence on the subject, but because that evidence refuted the premise of its opinion.

(8) SUBSEQUENT HISTORY OF THE SHIPMENT

We now summarize the disposition of the flour from the time it left the ship.

As previously stated this was priority cargo. The flour was discharged commencing on February 21. Flour was completely off the ship sometime on February 23, according to the records of Caswell. (Aps. 217)

It was to be carried by rail in open flat cars directly to consignee's mill in the same city, about 1800 meters from the dock. (Aps. 57, 59, 81, 109) This is a distance of little more than one mile. The cars apparently left the dock on the same day they were loaded. (Aps. 55,56)

Consignee's employees say that the flour began to arrive on February 22, and continued to arrive up to and including March 1, 1946. (Aps. 109, 116)

They do not state when the wet flour arrived.

Ferreira, an office clerk of consignee's, made the inspection upon arrival. Asked to describe the damaged lot, he states:

i. The sacks were wet.

j. The damage varied; some bags were wet on top, others on the bottom or sides, and others completely wetted. (Aps. 109)

The wet sacks were segregated under his supervision. (Aps. 107)

A surveyor, Ramos, then 24 or 25 years old, and employed by consignee's insurance company, later inspected the damaged flour. (Aps. 66, 67) The dates were March 6 and 8. He found 3,087 bags damaged. (Aps. 68) At this time the sacks were dried and spotted. The flour had formed a hard crust. (Aps. 69) The damage was in patches of various sizes, some on the ends, some on the sides. No system could be noted. (Aps. 76)

Samples were taken by Ramos from six sacks selected at random (Aps. 69, 75) and delivered by him to the chemist Barreto. (Aps. 70) No sample was preserved. (Aps. 71)

The damaged flour was taken to consignee's mill for separation. (Aps. 104) No record is produced as to the results of segregation, or the cost thereof. This matter is taken up at page 40, *infra*.

Ramos formed no independent conclusion as to

the cause of the damage. (Aps. 77, 80) He took no part in the disposition of the damaged flour—has no knowledge as to this. (Aps. 81)

(9) APPELLEE'S EVIDENCE

None of the evidence so far referred to supports the court's finding that these 3087 bags of flour were wet when discharged from the "SWEEP-STAKES."

The fact that they arrived at consignee's premises wet is consistent with the fact that they were discharged dry. There is an unaccountable delay of at least six days in carrying this shipment less than 1.12 miles.

Appellee offered no evidence as to where the flour was taken, what conditions it encountered, anything to inform the court.

The statement of the court:

"I do not find any fact or circumstance in the evidence as to what occurred from the time of discharge of the goods from the vessel until their arrival at the libelant's warehouse or mill which would give rise to or establish or tend to prove that the goods were damaged by sea water or were damaged at all while being unloaded from ship to dock and/or while being transferred from dock to libelant's mill or warehouse." (Aps. 357)

is incongruous. There were no such facts or circumstances put in evidence, other than as to unloading.

On oral argument appellant urged the court to consider this gap in appellee's proof. Our position was that the burden was upon libelant to establish its allegation that the damage occurred while the goods were aboard the "SWEEPSTAKES." The court expressed surprise at such a contention. His unannounced view that the burden was ours seems to be the only explanation for this expression in the opinion.

We turn now to the evidence offered to connect this damage with the ship.

The chemist Barreto made a report of analysis of the samples given him by Ramos. This report is dated March 11, 1946, and is Libelant's exhibit 4.

It is addressed to consignee's insurer, and the part here important reads:

"The analysis made on two samples of wheat flour, with the designations: Moinho da Luz—Recl. 18025, gave the following result:

Chlorites

(Derivatives of chloric acid)....	Presence
Sulfates	Traces
Sodium	Presence
Calcium and Magnesium.....	Traces
Reaction	Acid

"From the result of the above analysis, it is concluded that the average came from salt water." (Aps. 90)

The chemist reported (before any controversy arose) that he analyzed *two* samples of *wheat flour* in terms of *qualitative analysis*, and concluded

from that analysis that the contaminant was salt water.

On October 21, 1948, the chemist Barreto gave his deposition upon written interrogatories before the Vice Consul at Rio de Janeiro. This was two years and seven months and more after he issued his report.

In this deposition he testifies that he

- a. Identifies exhibit 4 as a *full, true and correct* report of the chemical analysis made by him upon the samples submitted by the insurance company. (Aps. 84)
- b. Made both a silver nitrate test and a Volhard process analysis for chloride, upon *six* separate samples. (Aps. 85, 91)
- c. Made both a qualitative and a *quantitative* analysis for sodium, upon *six* separate samples. (Aps. 86, 91)
- d. Made a quantitative analysis of the *undamaged* flour. (Aps. 93)
- e. Made a *comparative analysis* of other flour intentionally contaminated by salt water. (Aps. 87)
- f. Made a separate analysis of the *sacking material*. (Aps. 87, 88)
- g. Took *his own samples*. (Aps. 88, 89)

He disputes himself, however, on this point. (Aps. 92) So does Ramos. (Aps. 70)

No percentage figures were adduced in support of his recollection of his quantitative analyses. (11, Aps. 86; 16, Aps. 87; 6, 8, Aps. 93; 14, Aps. 95)

No samples were preserved. (Aps. 89)

His testimony, if believed, establishes that 6 of the 3,087 damaged bags had been in contact with salt water at some time before being sampled.

The uncontroverted evidence in the case is that 6/3087, or slightly less than 0.2%, is not a sufficient sample to stand as representative.

Dr. Punnett, a consulting chemist with the Pease Laboratories in New York, with a broad experience (Aps. 281, 282), testified upon oral interrogatories to the accepted method:

“Samples are taken from a number of bags approximately equal to the square root of the total number of bags, with the provision that not less than ten bags be sampled.” (Aps. 294)

Other details of the method are given. (Aps. 294, 295):

“That method is accepted by the Association of Official Agricultural Chemists, and is printed in their book which is entitled ‘Official and Tentative Methods of Analysis of the Association.’ The same method is accepted by the American Association of Cereal Chemists and printed in their book of methods which is entitled ‘Cereal Laboratory Methods,’ published in 1947. The methods endorsed by these two societies are accepted almost universally by chemists who are engaged in food analysis or cereal analysis.” (Aps. 295)

As to the sampling in this case, he said:

“My opinion is that the sampling of six bags out of some 3000 would be most inadequate.” (Aps. 296)

The square root of 3087 is 55.

The logical basis of sampling is explained by Dr. Punnett under cross-examination. (Aps. 321, 322) The object is to establish a high degree of probability that the samples represent the whole.

“* * * the sampling is always considered to be a high degree of importance, perhaps of equal importance to the exact analysis, and establishes the reliability of the results obtained by the analysis.” (Aps. 322)

Even the chemist Owens, called by appellee at the trial, was not asked by its counsel as to the sufficiency of six samples. (Aps. 333 et seq.)

Accepting Dr. Barreto's testimony at face value, therefore, there is still no proof that all of this flour was damaged by salt water.

Still less is there proof that such damage occurred before the flour was discharged. Barreto himself does not say so.

Some sacks may have encountered much different conditions than others during the week-long haul over that 1.12 miles between the dock and the consignee's premises.

Salty tarpaulins, rain, spray from the seaside, the wooden flat cars fresh from carrying salt hides or casks, any number of possible combinations might account for a salt reaction obtained by Barreto.

These speculations are at least consistent with the evidence.

The court's speculation, which the chemist did not make, is that the 3,087 bags were wet with seawater when discharged from the "SWEEP-STAKES."

This is the well-spring of findings and conclusions attacked by our assignments of error 1, 2, 3, 4, 11a, b, e and 12.

(10) CONCLUSION

We urge the court to hold that upon all the evidence material to this issue, appellee did not prove by a preponderance of the evidence that the sacks were wet when lifted out of the ship, and that the court's findings to this effect were error.

We further urge the court to rule that upon the same and other evidence inter-related thereto, heretofore summarized, appellant proved that the SWEEPSTAKES was in all material respects seaworthy and that its personnel exercised due diligence to protect appellee's goods while in their care.

The basis of this request is the district court's opinion (Aps. 357) and findings (VII, VIII, Aps. 27, 28) of negligence and improper care. Since no negligence was alleged (libel, Aps. 4), apparently the court concluded that the origin of the water was some peril of the sea (a cause excepted under §4 (2) (c) of the Carriage of Goods by Sea Act, 46 USC §§1300 et seq., pleaded in the answer, Aps.

7, 8), but that the ship was guilty of negligence and improper care, making her owner liable.

In any event, the findings as facts of negligence and improper care are wholly improper—they have no support whatever in the evidence.

B.

WHETHER EXPERIENCE OF THE VESSEL ON THE PRECEDING AND SUCCEEDING VOYAGES IS RELEVANT TO THE ABOVE ISSUE.

The error assigned is:

“10. That the Court erred in rejecting respondent’s evidence of condition and seaworthiness of respondent’s vessel “SWEEPSTAKES” as to prior and subsequent voyages of the vessel, and north bound on the same voyage in respect of showing no sea water damage or other damage to any cargo on such voyages; that there were no leaks and no repairs were made to the vessel, all as bearing upon the issue of the possibility of sea water damage on the voyage in question.

That libelant objected to said testimony as follows:

‘Mr. Howard: At this point I object to that question. It is a question directed to the Master of this vessel interrogating him as to claims for damage to sugar carried on a previous voyage. I submit whether or not they had any claims for damage on a previous voyage had no bearing on the claim made by libelant in the present case. Before Your Honor rules on that I would like an opportunity to cite authorities I have on that question.’ (Aps. 140).

‘Mr. Howard: I object to this question and the next three questions following on the same grounds as stated this morning, that is, that

this now relates to a subsequent voyage and not the voyage in question. I submit that any evidence of cargo or damage, if any, that may have been sustained to cargo on a subsequent voyage would not be admissible for the same reason that evidence of damage on a prior voyage would not be admissible.' (Aps. 165).

"That the court sustained said objections and excluded said evidence and all subsequently offered evidence on the same issue. (Aps. 141, 143, 144, 146, 148, 177, 178).

"That respondent made due and proper offers of proof in substance as follows:

"That on the preceding voyages of this vessel to European and South American ports and return to New York and upon return to New York on the northbound voyage in question, and on the subsequent voyage to South America, there was no evidence of leakage of the hull or decks or at all, or of any water, sea water or moisture damage to cargo from any source or cause." (Aps. 142, 144, 146, 147, 178) (Aps. 38-40).

We at once acknowledge that the district court does and should have wide discretion in determining the scope of indirect evidence.

The problem before the court, however, was to determine a physical fact: did seawater get into the SWEEPSTAKES' holds?

Appellee had presented a case of indirect and circumstantial proof—Barreto's analysis being the only link to salt water, much less the ship.

Appellant called as its first witness the man best acquainted with that ship—master of the SWEEPSTAKES since 1944. (Aps. 138, 139).

Appellant sought to develop that the ship had not leaked before and did not leak after the trip from New York to Rio. It brought out that on the preceding voyage, outbound, the SWEEPSTAKES carried a full load of sugar. (Aps. 140) Our object, as stated to the court (Aps. 141), was to show

the unlikelihood of any such damage, because we had none on the voyage in question, none on the preceding voyage, none on the subsequent voyage, no repairs were made to the ship
* * * we are trying to show the whole picture.

The express question then before the court was whether there had been any claims for damage to the sugar. (Aps. 140). This is once-removed from the question whether there was damage, but the precise question is unimportant. The court expressly rejected any evidence relating to the matters above outlined by counsel.

You will have to pass the questions and answers which relate to that point. (Aps. 141)

The following offers of proof by the master, Captain Lane, were made, and in each case appellee made the same objection (no bearing on the case), and in each case the court sustained the objection:

“ . . . I offer to prove by this witness and the questions and answers contained in the deposition that on this voyage to which the witness is testifying, being the voyage immediately preceding the voyage on which the alleged damage occurred, that the vessel discharged its cargo at Marseilles, France, in

100% condition; that there was no loss or damage on account of sweat or water damage; and that on this voyage there was no evidence of any leaking of the hull or deck plates in any respect." (Aps. 142).

"In connection with my offer, I offer to prove by this witness, in addition, that on the voyage from Naples to Rio de Janeiro, being the immediately preceding voyage, the vessel carried a full cargo of military supplies, food stuffs, a full cargo, and that there was no damage to any cargo on that voyage." (Aps. 144).

"I offer to prove by this witness that after discharging the cargo at Rio which came from Naples, the vessel then went to Buenos Aires, loaded wool and hides; went to Montevideo, loaded more wool; then to Santos and loaded coffee; then to Rio and loaded more coffee; stopped at Trinidad for fuel oil; then proceeded to the United States, North Atlantic ports including Boston and New York; and that during the course of this northbound voyage there was no evidence of leakage in the vessel, no damage to any cargo." (Aps. 146)

"The offer, Your Honor, is merely to prove by this witness that there was no damage to cargo by leakage or water on this northbound voyage and that the cargo was discharged." (Aps. 147)

"In view of the Court's ruling, the respondent offers to prove by this witness that on the northbound voyage immediately following the discharge of the flour at Rio de Janeiro the ship called at Buenos Aires and Montevideo and loaded cargo consisting of hides and wool and casein, and coffee at Santos and Rio, and that this cargo was carried to New York where it was discharged, and that there was no damage to any cargo by reason of water or salt

water on this immediately following north-bound voyage of the vessel." (Aps. 178).

It seems self-evident that if enough sea water could get into a ship to seriously damage 3,087 large bags of flour, there is something wrong with it. Any evidence touching her condition or seaworthiness so far as leaks are concerned is directly in point.

The court wanted to know her condition at time of loading. (Aps. 146) It did not perceive that the evidence of such condition is cumulative, and largely circumstantial. Cargo vessels are in business. They arrive, berth, discharge, load and depart for the next port as quickly as possible, to stay in business. Only on the occasion of dry-docking and annual inspection and classification can it be said with any reasonable assurance: all welds are sound, all pipe fittings are tight, etc.

It is of course conceivable that some unique disaster occurred, or that some serious leak was sprung, patched and concealed by the ship. But such things are improbable. Moreover, they would leave a train of evidence not beyond the ken of those interested.

The *probability*, assuming that the water did leak in in such great quantity, the probability is a continuous weakness of some kind.

We submit that the most credible proof whether there was such a weakness is the condition of other

susceptible cargo, before, during and after the voyage from New York to Rio. Flour gets off with relatively light damage from salt water. (Aps. 265) Sugar (Aps. 142), wool, hides, coffee (Aps. 146), and casein (Aps. 178) would scarcely fare better than did appellee's flour.

In *Castile v. Bullard*, 64 US 172, 188, the Supreme Court stated:

“Whenever the necessity arises for a resort to circumstantial evidence, either from the nature of the inquiry or the failure of direct proof, objections to testimony on the grounds of irrelevancy are not favored, for the reason that the force and effect of circumstantial facts usually and almost necessarily depend upon their connection with each other. Circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof. Applying these principles to the several exceptions under consideration, it is clear that no one of them can be sustained.”

We respectfully submit that the necessities of the case called for circumstantial evidence as to the possibility of a leak; that no one circumstance which appellant might prove was conclusive upon this issue; that these circumstances offered to the court, together with the other circumstances shown, were “by their number and join operation, especially when corroborated by moral coincidences, sufficient to constitute conclusive proof.”

In the premises the court's refusal to hear and consider them was prejudicial to appellant and unwarranted in law.

C.

NOTICE OF SURVEY

The assignment is:

"9. That the Court erred in finding that libellant gave respondent sufficient notice of damage or claim and in finding that respondent was afforded sufficient or any opportunity to survey, test, sample or analyze the alleged damaged flour. (Finding of Fact 10.)" (Aps. 38).

The finding in question (Aps. 29) follows from this holding:

"The Court believes that by the communication dated the 2nd of March, following the commencement of discharge of the cargo at Rio de Janeiro on February 21st, the respondent had as good an opportunity to make an analysis of the damage as did the libellant. . . ." (Aps. 356).

The letter in question, from consignee to Moore-McCormack, S. A., is in substance as follows:

'Gentlemen: Ref.: 10,500 sacks with 252,000 kilos of flour shipped in New York on the steamship "SWEEPSTAKES," corresponding to bills of lading dated 1/31/46. Having noted a certain number of torn sacks with loss of contents, and as many more wet, on the unloading of the flour under reference, we are advising you that we hold the steamer's owners responsible, as transporters, for the averages above mentioned.' (Aps. 64).

It will be seen at once that this letter does not

advise of the immense damage claimed in suit (29% of the whole shipment) nor give any intimation of a claim of seawater contamination. Nor does it advise that the flour was still on hand (it had been delivered eight days or so before receipt of the letter). Nor does it suggest survey.

This Court, having in mind the knowledge of the witness Caswell as of March 2, to-wit, his personal observation and familiarity with damage on out-turn, can readily appreciate the basis for his reply to the above letter, in substance as follows:

'Ref: SS SWEEPSTAKES, V 12S 10,500 Sacks of flour. Gentlemen: In reply to your favor of the 2nd inst., we must inform you that according to the registers of defects and averages of the Wharf Warehouse, the packages above were unloaded in perfect condition, the which exempts us from any responsibility.' (Aps. 65).

It seems to us that in the circumstances—the intervening railcar carriage, the clean discharge and customs records, and the fact that Caswell was not apprised of the size of the claim—the appellee was under duty to notify of the findings of Ramos and Barreto, and afford an opportunity of verification.

While *Evansville-Marblehead* (EDNY), 1941 AMC 62, is a collision case, the remarks of the Commissioner are appropriate here.

“* * * if the wrongdoer must make the libellant

whole again, he should have, at the very least, an equal opportunity to survey, estimate and appraise the damage for which he is asked to pay." (64)

"I am constrained to dwell on this matter because this case is a concrete example of the trouble, delay and expense such a course may entail for all the parties." (65)

The penalty against claimant is that its surveyor's (and in this case, its chemist's) testimony is most carefully scrutinized and judged accordingly. Report of Commissioner, *Ansaldo San Giorgio I* (SDNY), 1933 AMC 402, 407. The "strictest proof of the character and extent of the damage is required." *Glenbogie* (N. D. Ohio), 1937 AMC 1194, Commissioner's report, 1202.

The essence of the district court's finding is that it holds appellant as though it had attended. *Caledonier* (SDNY), 60 F. (2d) 562, 1932 AMC 954, 955.

The error assigned bears both upon the weight to be attached to Barreto's testimony about his analysis, and upon the weight to be given Ramos' estimate of damage.

We urge the Court to overrule the finding that the notice of claim was in effect an invitation of survey, as not justified by the evidence.

D.

EXTENT OF DAMAGE

The errors assigned are:

"5. That the Court erred in finding that there

was a competent or sufficient survey, testing, sampling or analysis of damage to said flour on the basis of chemical analysis, testing or sampling to establish a loss or damage of 35% of the sound market value of the contents of each bag, or in finding that there was any competent or sufficient evidence of any other percentage, measure or extent of loss or damage whatsoever. (Findings of Fact 8 and 9.)" (Aps. 37, 38)

"6. That the Court erred in finding that there was no salvage obtained or obtainable from the damaged flour. (Finding of Fact 8.)" (Aps. 38)

"8. That the Court erred in finding that the difference between the sound market value and the value of the alleged damaged flour was \$6,774.42 or any sum whatsoever. (Finding of Fact 9.)" (Aps. 38)

"11. That the Court erred in making and entering Conclusions of Law 1 and 2 in that there was no proof or sufficient proof—

(c) That the damage was 35% or any other percentage or measure of damage;

(d) That the sound value of the flour, less damaged value was \$6,774.42 or any other ascertainable sum;

(e) That the evidence was insufficient to establish respondent's liability at all and was insufficient to establish any basis of damage as to the extent thereof or the value thereof." (Aps. 40).

The only probative evidence offered by appellee as to damages was the testimony of Ramos, summarized at page 25, *supra*. In answer to written interrogatories Ramos stated that he was employed by the consignee's insurer (Aps. 66, 67) as a surveyor. The deposition was taken on November 19,

1948, at which date Ramos was 27 years old (Aps. 66). He was therefore 24 or 25 years old at the time of survey. (Aps. 68) He had no technical training (Aps. 67), and did not testify as to any previous experience in handling damaged flour.

He did verify the count of damaged sacks, and select six sacks at random for inspection. (Aps. 69). He concluded that the damage was from water. (Aps. 71).

He opened the six sacks. "In each sack it was estimated that nine kilos of flour were damaged. The percentage was therefore calculated at thirty-five per cent. It could be seen that the other unopened bags were in the same condition." (Aps. 72).

Nine kilos is approximately twenty pounds. It is 18% of the weight of the sack.

On cross-interrogatories Ramos testified that: "The damage was in patches of various sizes, some located on the ends, some on the sides. No system could be noted." (Aps. 76).

He admitted that no actual segregation was made in computing the percentage of damage in the six bags. (79) "The damage was estimated, taking into account the apparent depth of penetration and also the additional labor which would be required to salvage the good flour, and replacement of the bags." (Aps. 79)

Ramos had nothing to do with the subsequent

disposition of the flour. (81) As appears from other testimony, it was in fact sent to the appellee's mill and reconditioned. (Aps. 104, 112, 119). Ferreira testified he believed the consignee had records of the flour recovered in reconditioning (Aps. 104), but the accountant Herold denied it (Aps. 120).

The evidence of appellant on this point was given in open court. Gow, an experienced marine surveyor, testified at length as to his experience in handling water damaged flour. (Aps. 258 et seq.)

His testimony was in substance that to fairly estimate damage, sacks would have to be segregated according to degree of damage (Aps. 262, 263), that if damage was varying a minimum of 10% of the bags would have to be examined (Aps. 263).

He further stated that in his opinion no one could determine the extent of damage to a sack of flour without segregating and weighing the good flour. (Aps. 267)

In his experience with *totally submerged* flour sacks recovery was made of 95% of the contents (case of Djambi, Aps. 264, 265, 275, 277), the reconditioned flour being perfect.

The gluten seal explains this phenomenon. (Aps. 267)

We submit that the evidence of Ramos, standing alone, is insufficient to establish appellee's damages in any amount. His sampling fell so far short of representation or fairness that it can scarcely be

convincing. His guess at the weight of damaged flour appears unreasonable, and measured by the results obtained in *Djambi* is absurd.

Courts have previously taken notice of the importance of sampling.

West Faralon (N.D. Cal.), 55 F. (2d) 725, 727, 1932 AMC 302, 305:

"Libellant's witness, Mr. Eckford, testified with reference to the examination before shipment of the two lots for which damage is asked. In making his inspection and survey, he opened 14 bags out of the 1,500 bag lot, and 25 bags out of the 4000 bag lot, one sample taken from each bag being 'about two grab-handfuls.' He made tests for count and weight, but no boiling test, and apparently his examination of the sample was purely visual of the exterior of the nut.

"Respondent's witness Wilson testified that opening 14 bags out of 1500, and 25 out of 4000, was not a fair test of either shipment; that opening 5% of the shipment was the customary sampling in the Orient, and 10% in San Francisco; that this custom of the trade would have required Mr. Eckford to open 75 bags out of the 1500 bag lot (instead of 14), and 200 bags out of the 4000 bag lot (instead of 25), if he followed the Oriental custom, and 150 and 400 bags if he followed the custom of the San Francisco trade for which the peanuts were intended; that the 'grab-handful' method of getting the sample was improper; that the proper method is to open the bag, dump the contents, inspect the entire contents, and then get the sample from the contents as a whole.

"Mr. Wilson's testimony in this regard was corroborated by other witnesses. It is doubtful if the test made by Mr. Eckford was fair."

Contrary to the practice of public surveyors, Ramos made no effort to follow through and determine the actual results of reconditioning and sale. Since appellee itself made the separation, without retaining a record of the result, it should scarcely be in a position to benefit by that conduct.

The proper legal consequence is indicated in the syllabus to *Meyer & Brown v. Cunard Steamship Co.* (SDNY), 1924 AMC 873 (not reported in full) :

“Where there is no evidence of sale of goods as damaged, nor of reconditioning, but only a surveyor’s estimate of what would have to be done, libellant must bring further proof of injury to the goods and/or cost of reconditioning.”

Compare *Caledonier* (SDNY), 60 F. (2d) 562, 563, 1932 AMC 954, where although damages were founded on estimate, the examination was “thorough,” and the surveyor “skilled in his work.”

We urge the Court to reject the findings of the lower court as to extent of damage, as based upon speculation and guess, and particularly because the true result of reconditioning, the real evidence of damage, was or should have been in appellee’s hands, and was not produced.

We submit further that the opinion evidence given by Gow is the only credible evidence of the possible extent of damages, and that damages in any event should be fixed at not over 10%, where there is no

showing of taint or other than physical loss. (Aps. 264, 266).

E.

EVIDENCE OF MARKET VALUE

The assignments are:

"7. That the Court erred in finding that the sound market value of flour at the port of Rio de Janeiro at the time of delivery to libelant was 137 Cruzeros or 126 Cruzeros, or in finding that there was any competent or sufficient evidence of sound market value of said flour. (Finding of Fact 9.)" (Aps 38)

"8. That the Court erred in finding that the difference between the sound market value and the value of the alleged damaged flour was \$6,774.42 or any sum whatsoever. (Finding of Fact 9.)" (Aps. 38)

It has already been pointed out (under *D*, supra) that appellee's evidence as to the quantum of physical damage and cost of reconditioning was speculative at best. If the opinion of Gow is considered, it is worse than speculative—it is grossly at odds with experience in flour reconditioning.

Damages were calculated by multiplying the speculative estimate by a market-value figure. (Opinion, Aps. 357; Finding IX, Aps. 28).

In this sub-section we challenge the sufficiency and competency of appellee's evidence as to market value.

In appellee's answers to interrogatories, filed in March, 1948 (Aps. 19), more than a year after suit

was commenced (Aps. 6), appellee stated:

“Interrogatory No. 17. Sound market value at Rio de Janeiro, duty paid, of each bag of American wheat flour weighing 50 kg. as of date of discharge was Cruzeiros 126.00, which at the then prevailing rate of currency exchange would be \$6.62 U. S. funds per bag.” (Aps. 17)

We presume that there was some basis in fact for such a statement.

The only evidence in the case is the testimony upon written interrogatories of one Herold, an accountant employed by appellee. (Aps. 115, 116)

Late in 1949, and shortly before trial (Aps. 128), Herold was called upon to testify as to his personal knowledge of the disposition and sale of this flour, and its cost and market value. He was advised of the interrogatories well in advance. (Aps. 122, 123) He took data from appellee's records and made notes for purposes of giving testimony. (Aps. 116, 118, 123).

He had no personal knowledge as to the condition or disposition of the damaged goods. (Aps. 116-120).

He testified in detail as to the elements of delivered cost, arriving at a figure of Cr. \$98.2594 per sack. (Aps. 122)

Testifying to market value, Herold stated:

“According to our records the selling price was 137 cruzeiros per sack of fifty kilos.” (Aps. 121)

Appellant objected to admission of this evidence on the basis of matters contained in the cross-interrogatories. The court reserved ruling. (Aps. 121)

The pertinent cross-interrogatories and answers are these:

“Cross-Interrogatory No. 4: If you have refreshed your memory from records, please state what these records are and when made and where they have been kept since you made them.

Fourth—To the Fourth Cross Interrogatory he says:

The date of entry I have taken from daily statements received from the mill; the cost of the flour I have taken from our accounting records. These records are kept at our office at Rua Rosario, No. 160, and they were made on the occasion, in February or possibly March, 1946. (Aps. 123).

“Cross-Interrogatory No. 23: Are there records or published prices of fifty kilo bags of Aida Brand wheat flour applicable to the months of February or March, 1946, at Rio de Janeiro, as sold by the mills or companies such as Companhia Luz Stearica?

Twenty-Third—To the Twenty-Third Cross-Interrogatory. He says:

I don't think there are published prices. Prices of flour in recent years have been fixed by the Central Price Commission both for manufactured and imported flour. We sell our flour at those prices. (Aps. 126).

“Cross-Interrogatory No. 24: State what that price was and furnish a copy of the record or published price list of such flour.

Twenty-Fourth—To the Twenty-Fourth Cross Interrogatory. He says:

I cannot furnish a record, but as I have

stated, I believe the prices to have been 137 cruzeiros per bag of fifty kilos of this brand or type." (Aps. 126).

Our objection to receiving Herold's testimony of price, and the wholly unwarranted effort of the trial court to secure our consent to be bound by that testimony, is set out verbatim for the Court's convenience:

"Mr. Wakefield: If the Court please, that is the answer that I wish to move to strike, the answer to Cross-Interrogatory No. 24, and also the answer to direct Interrogatory No. 21, for the reason that the answer to Cross-Interrogatory No. 23 shows that the price of imported wheat flour at Rio de Janeiro was governed by a Government agency, to-wit, the Central Price Commission, at this time and was fixed. That is similar, I take it, to our OPA.

"In his answer to Cross-Interrogatory No. 24 he says he believes the price was 137 cruzeiros per fifty kilo bag, and that relates back to his answer to direct Interrogatory No. 21, where he says without qualification that it was that much per bag, for this reason: In the first place, if the price is a matter of public record, fixed by the Central Price Commission, that is definitely the best evidence. Here where we are thousands of miles away and must rely on these depositions, I take it that we are entitled to be at least reasonably technical about these matters, because my cross-interrogatory asks for a copy of the record or published price list, and the witness has failed to furnish that.

"His answer is, 'I believe' it was so and so. He is testifying almost four years after this date of March, 1946, and to permit to stand in a deposition as testimony the fact that he believes it was so and so, when it is shown by his

own testimony that it is a fixed price by a Government agency, and where I asked for a copy of it, I think is entirely improper, incompetent and prejudicial to the respondent's case. We can't cross-examine his recollection, and where it is shown by his own statement that there is a record of it, to-wit, the Central Price Commission having fixed it, I take it that should be stricken, that he believes it was 137 cruzeiros.

"The Court: Has the libelant adopted any other means or method of proof on this issue?

"Mr. Howard: This is the only sworn testimony on that, Your Honor. I will say this, that at an earlier stage in this proceeding, when certain interrogatories were propounded to us by Mr. Wakefield for answer on behalf of libelant, I answered at that time that the corresponding figure would be 126 cruzeiros.

"The Court: The statement here is 137.

"Mr. Howard: 137, yes, Your Honor. In answer to interrogatories, I had made the statement that, 'Sound market value at Rio de Janeiro, duty paid, of each bag of American wheat flour weighing 50 kg. as of date of discharge was Cruzeiros 126.00.' I did not make that statement at that time on the basis of this witness' testimony; I made it on the basis of reports we secured from our correspondents at New York who advised us that was the sound market value.

"The Court: And this is at variance with that statement?

"Mr. Howard: To the extent of 11 cruzeiros. I am willing, if counsel objects to this, to limit my proof on damages to the statement I previously made on answers to interrogatories, namely, 126 cruzeiros. Neither one of us knew of this answer until this deposition was received, as of Monday, a week ago today.

"The Court: Have you any objection to the

proposal made by Mr. Howard? Do you object to his doing so in view of the surprise answer, surprise not only to you but to Mr. Howard? Mr. Howard should be entitled to have some proof of the allegation, and if he in good faith relied upon this as being some evidence of the allegation before opening this deposition, you can plainly see the disadvantage, can you not?

"Mr. Wakefield: Definitely.

"The Court: Otherwise, he might say, 'I ask a continuance of the trial for the purpose of getting other testimony on this matter of selling price.' I do not know that his request to that effect would be granted, but you can see what position he might be put in.

"Mr. Wakefield: I realize that. That is why we had the continuance before, so he could get this testimony, but it is his burden of proof to prove market value or landed value or invoice value.

"The Court: Have you any information which makes you believe that it would be injurious to the best interests of your client to make admission that the price was as stated in his client's answer to your interrogatory?

"Mr. Wakefield: The only thing I can answer to that, our Honor, is that I don't know. I haven't any idea what the price is.

"The Court: For the purpose of the case, what is your attitude?

"Mr. Wakefield: My attitude is that it is his burden of proof, and he had a continuance from Your Honor once; now he is back here without adequate proof the second time." (Aps. 126-129)

The continuance referred to was secured by appellee on the morning first set for trial, because it then had no proof of market value.

The Court ruled as follows:

“The Court: I think that the witness in cross-examination has justified the Court’s permitting the answer to stand. I think he has made a technical qualification for the application of secondary evidence in lieu of the best. He stated on direct examination the record information, and then on cross-examination by written interrogatories, just the same form as the direct examination was in, that while he did not have the records with him, he believed what he now says and in effect what he previously said in his direct examination. I believe that that raises to admissibility the secondary evidence, namely, his recollection of what the record showed, and that I believe is a technical qualification for the answer.

“However, I believe also that the circumstances of this being a deposition taken upon written interrogatories in a foreign country, and it being in an admiralty case, that the strictest rigidity of the best evidence rule should not here be applied. After all, this deposition is taken upon written interrogatories; it is not taken on oral. If counsel on either side desire to cross-examine this witness’ qualifications for stating the secondary evidence, they had a right to take his deposition by oral interrogatories instead of written, if they wished to do so. Both sides elected to take the deposition upon written interrogatories, and I do not believe there should be applied to this situation the same rigid requirement as to secondary evidence which we might feel that it was appropriate to apply if the witness was on the stand being cross examined, or if he had been then and there upon the stand subject to oral examination.

“The objection is overruled.” (Aps. 133, 134)

1. EITHER THERE WAS A RECORD OR THERE WAS NONE.

If there was none, as indicated by Herold's statement: "I cannot furnish a record" (Aps. 126), then the best evidence rule is not involved. But the trial court believed he stated "The record information." (Aps. 133) This is apparently based on Herold's testimony first quoted, to the effect that "according to our records" the price was Cr. \$137. The ruling is therefore premised on Herold's information from the records.

2. IF THERE WAS A RECORD, THE LAW REQUIRED ITS PRODUCTION.

Herold knew of the interrogatories well in advance of giving testimony, as previously shown. He is an employee of appellee. Our only effective means of cross-examination was to ask him to produce the record from which he testified. (Aps. 126) He says: "I cannot furnish a record."

The best evidence rule upon this point is summarized in 20 Am. Jur. 907, Evidence, §1620, as follows:

"Oral evidence of the contents of books of account is not competent unless a proper foundation is first laid therefor. The mere conclusions of witnesses as to the substance and effect of entries in books are not admissible in evidence where neither the original entries nor copies of them are produced. . ."

Expressly, as to testimony contained in depositions, the rule is stated:

"§ 417. Depositions Even though the foundation for using a deposition as evidence is established by reason of the unavailability of the deponent as a witness, so far as the deposition is a statement of the contents of a letter or other writing, it is secondary evidence and is inadmissible as proof of the contents of such writing unless it is established that the writing itself cannot be produced." (Id., § 417)

The witness, an experienced accountant, offered no explanation as to whether the record from which he testified was lost, destroyed or what. In other words he laid no foundation whatever for secondary evidence.

The lower court makes the inexplicable remark that if we wished to cross-examine Herold's qualifications for stating secondary evidence, we should have employed counsel in Rio! We asked for the *record*, not for secondary evidence.

3. DAMAGES BASED ON AMOUNT STATED IN ANSWER TO INTERROGATORIES IS ARBITRARY.

Respondent did not offer libelant's answer to its Interrogatory 17 as evidence.

Answers made to interrogatories of respondent are not evidence for libelant. *Baker, Carver and Morrell Co. v. Mathiasen Co.* (CA, 2), 140 F. (2d) 522, 1944 AMC 181, 185; *Hugo v. Hedger S. S. Corp.*, (CA, 2), 142 F. (2d) 349, 1944 AMC 610, 613.

While appellee may be bound by its admission of Cr. \$126 per sack (par. XII, Aps. 17, 18; Aps. 128), no competent evidence of market value is in the record, and it may not hoist itself by its own answers to interrogatories. *Baker, Carver & Morrell Co. v. Mathiasen Co.* (CA, 2) 140 F. (2d) 524, just cited.

The only theory for the challenged findings is that Cr. \$137 was proved.

4. OTHER EVIDENCE OF VALUE.

The only competent evidence of value is delivered cost, Cr. \$98.2594 (Aps. 122), which we conceded in trial as properly proven (Aps. 132).

We submit that the challenged findings are improper under the evidence, and that this Court should so find.

V.

CONCLUSION

We respectfully submit that the decree of the district court brought here for review is founded in disregard of the obvious truth and common-sense of the matter.

Upon the basic issue it postulates (giving appellee the benefit of any doubts) as follows:

1. The damaged sacks of flour were wet when examined at appellee's premises.

Six of these (not two, as first reported) were wet with salt water.

Therefore, it is possible that all the damaged sacks were wet with seawater.

2. The same flour was brought to Rio by sea.

It is possible for cargo to get wet from seawater while in an ocean vessel.

Therefore, it is possible that the damaged flour got wet from seawater while in the ship.

The facts which *must be* disregarded if this reasoning is to achieve the dignity of proof are:

1. It took an immense quantity of water to saturate 55,566 pounds of flour.

The dunnage and dunnage paper was dry when the flour was discharged.

The bilges were not flooded at any time during the voyage.

No other cargo (including flour to other consignees in the same holds) was damaged by water.

2. There was nothing in the voyage or condition of the ship to account for leakage of a large quantity of seawater into the holds, and it was the opinion of those in charge of the vessel and her cargo that such an incident was impossible.

3. Customs men and tallymen are required by law to note apparent damage on discharge, and it is to the benefit of both the customs men and consignees to have such notations made.

Customs records show no damage.

The United States Supreme Court has clearly condemned such reasoning as was indulged in by the trial court, in *Pennsylvania R. Co. v. Chamberlin*, 288 U.S. 333, 341, 342, 77 L. ed. 819, 823, 824, 53 S.Ct. 391.

“And the desired inference is precluded for the further reason that respondent’s right of recovery depends upon the existence of a particular fact which must be inferred from proven facts, and this is not permissible in the face of the positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the fact sought to be inferred did not exist. This conclusion results from a consideration of many decisions, of which the following are examples: (citing numerous cases). A rebuttable inference of fact, as said by the court in the *Wabash R. Co.* Case, ‘must necessarily yield to credible evidence of the actual occurrence.’ And, as stated by the court in *George v. Missouri P. R. Co.*, 213 Mo. App. 668, 251 S.W. 729, *supra*, ‘It is well settled that where plaintiff’s case is based upon an inference or inferences, that the case must fail upon proof of undisputed facts inconsistent with such inferences’.”

We further suggest to the court that exclusion of relevant experience of the vessel upon the voyages immediately before and after the one in question was error, in the circumstances of the case.

We urge again that the finding that Appellant had notice of survey is unsupportable, and that this bears upon the credence to be given to the estimates and analysis which are Appellee’s only evidence.

We suggest that the findings as to quantum of damage are speculative and disproven by the evidence of actual experience.

Lastly, we submit, the finding of market value

is arbitrary and based upon incompetent testimony under the best evidence rule.

We ask the Court to reverse the decree of the lower court.

Respectfully submitted,

J. CHARLES DENNIS,

United States Attorney.

BOGLE, BOGLE & GATES,

CLAUDE E. WAKEFIELD,

M. BAYARD CRUTCHER

(Of Counsel)

Proctors for Appellant.

603 Central Building,
Seattle 4, Washington.

No. 12510

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vs.

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Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT
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WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEE

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CHARLES B. HOWARD,
SUMMERS, BUCEY & HOWARD,
Proctors for Appellee.

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Seattle 4, Washington.



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No. 12510

IN THE
UNITED STATES
COURT OF APPEALS

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

CIA. LUZ STEARICA, a Corporation
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEE

I.

STATEMENT OF THE CASE

A. FACTS

In February, 1946, a shipment of 10,500 bags of wheat flour was loaded aboard the S.S. "Sweepstakes" at New York consigned to Appellee at Rio de Janeiro, Brazil. The vessel, owned by Appellant, and operated by Moore-McCormack Lines as agent, proceeded via Trinidad to Rio de Janeiro, Brazil, where it arrived on February 19, 1946 (Aps. 160).

The trial court found as a fact that this shipment of flour was received aboard the vessel at New York in apparent and actual good order and condition. Appellant does not assign error as to this finding—hence no question of “delivery in good order” to the ship is involved.

After arrival of the vessel in Rio de Janeiro, the shipment of flour was, by special arrangement, discharged directly into rail cars, rather than passing through the Brazilian Customs warehouse as normally would be true (Aps. 218-19). This was done due to the priority nature of the shipment (Aps. 185).

Several witnesses, including the master of the ship, a custom's checker and Appellant's own claim agent testified that no inspection of the flour was made by anyone at the exact moment of discharge, other than a tally of the number of bags landed from the vessel (Aps. 54, 58, 61, 162, 185, 220). As the rail cars were loaded, they were moved to consignee's mill, a distance of 1800 meters, or just over one mile, from the discharging dock. During this movement, the rail cars were securely covered by tarpaulins.

Discharging commenced on February 21, 1946, and was completed on February 25, 1946, according to the ship's log (Aps. 160). The flour arrived at the

mill and was inspected by representatives and employees of the Appellee-consignee, between February 22 and March 1, 1946. Reference to a calendar will indicate that a week-end intervened during this period.

Upon arrival and inspection of the flour at consignee's mill it was noted that a considerable quantity of the flour was damaged by wetting. 3087 bags of damaged flour were segregated (Aps. 119). Notice of the damage to the shipment was sent to Appellant's agent by Appellee's letter of March 2, 1946 (Aps. 64). Appellant's agent answered by letter of March 9 (Aps. 65) denying liability for the damage.

Appellee called for a survey of the damaged flour, which was conducted by an independent surveyor between March 6 and March 8, 1946 (Aps. 68). This surveyor called in an industrial chemist who took samples of the damaged flour and bagging material (Aps. 89, 91-2). After making chemical analyses of the samples, by recognized testing procedures, both quantitatively and qualitatively (Aps. 93), the chemist rendered his report giving his finding as to presence of sodium and chloride in abnormal amounts, forming the basis for his expressed opinion that the flour had been damaged by contact with salt water (Aps. 89, 94-5).

Thereafter, both the chemist and the surveyor arrived at a figure of 35% damage to the 3087 bags

of flour found to have been contaminated by salt water (Aps. 71, 90); however, the percentage of damage was finally agreed to be 40% because consignee's representatives protested the lower 35% figure (Aps. 75).

The amount claimed by the Appellee as libellant in this action was \$7,368.67 U. S. funds, based on 35% damage only, to 3087 bags of flour with a market value at destination of 137 cruzeiros, Brazilian funds, per bag. At the then prevailing rate of foreign exchange, the market value of each bag of flour would have been \$6.82 in U. S. funds.

Because of the trial court's ruling as to interrogatories, wherein it was stated that the market value per bag at Rio de Janeiro was only 126 cruzeiros, rather than 137 cruzeiros, as later testified by witnesses in depositions, Appellee stipulated in open court to allow the lower figure of 126 cruzeiros per bag to stand as the proved value (Aps. 128) and Appellant's proctor then *admitted* in open court that the market value was 126 cruzeiros per bag. (Aps. 132).

The findings and decree of the trial court allowed 35% depreciation on 3087 bags of flour at a value of 126 cruzeiros or \$6.27 U. S. funds per bag, making a total recovery for Appellee against Appellant of \$6,774.42 U. S. funds, plus interest and costs (Aps. 29-33).

B. QUESTIONS INVOLVED

In addition to the questions set forth in Appellant's brief, the question of burden of proof is involved, as follows:

Where there is no issue as to delivery of cargo to the ship in good order and condition, and delivery or receipt by the consignee at destination in bad order which damage is proved, is the consignee (Appellee) entitled to a decree against the carrier (Appellant) for its damage, in the absence of a showing by the carrier that the bad order or damage was due to some cause for which the carrier would not be liable under the contract of carriage and applicable law?

This question is raised by Appellant's Answer and affirmative defenses, was argued during the trial and is suggested in Appellant's brief (p. 27). The trial court held in effect that since delivery in good order and receipt at destination in bad order were proved, and the cause of the damage was proved to be sea water without proof of any fact to explain the cause of the damage, the consignee-Appellee was entitled to a decree for its proved damages (Aps. 356-7).

We contend that the evidence amply supports the findings referred to above.

II.

ANSWER TO ARGUMENT OF APPELLANT

A. PROOF THAT FLOUR WAS WET FROM SEA WATER
AT DESTINATION

Appellant seems to premise its argument on the supposition that owners of cargo will be present on the dock at the exact moment that the cargo is discharged to determine whether their cargo has sustained damage during carriage aboard a vessel. Obviously that is not so, and would not only be impracticable but unreasonable. It has been recognized as such by this court in the converse situation of inspection at the time of loading of cargo.

“While Appellee did not show examination and inspection of all barrels *at the very moment of loading*, we think to require such proof would have been unreasonable and impractical.” (Italics added for emphasis)

Apex Fish Co. v. U. S. A. (CA, 9) 177 F.
(2d) 364, 1949 A.M.C. 1704, 1710.

To the same effect as to inspection at time of discharge, see *The Astri* (CA, 2) 151 F.(2d) 5, 1945 A.M.C. 1064, 1068, 1069.

This is particularly true in the case of salt water, or sea water damage, where our courts have for many years recognized that the burden is upon the carrier to explain the cause of such damage.

In a case of salt water damage to cargo from an undetermined source or cause, this Court in a de-

cision rendered in 1910 held that the burden was upon the carrier to prove the cause or origin of the salt water to be within one of the excepted causes under the bill of lading contract. *The Medea* (CA, 9) 179 Fed. 781. This Court quoted at length from the decision of the U. S. Supreme Court in *The Folmina*, 212 U.S. 354, 362, 29 S. Ct. 363, 365, 53 L. Ed. 546 on this point as follows:

“Where showing an injury by sea water does not in and of itself operate to bring the damage within the exception against dangers and accidents of the sea, it follows that it is the duty of the carrier to sustain the burden of proof by showing a connection between damage by the sea water and the exception against sea perils.”

“The inability of the court below to determine the course of the entrance of the sea water would imply that the evidence did not disclose in any manner how the sea water came into the ship. In other words, while there was a certainty from the proof of a damage by sea water, there was a failure of the proof to determine whether the presence of the sea water in the ship was occasioned by an accident of the sea, by negligence, or by any other cause. Manifestly, however, the presence of the sea water must have resulted from some cause, and it would be mere conjecture to assume simply from the fact that damage was done by sea water that therefore it was occasioned by a peril of the sea. As the burden of showing that the damage arose from one of the excepted causes was upon the carrier, and the evidence, although establishing the damage, left its efficient cause wholly unascertained, it follows that the doubt as to the cause of the entrance

of the sea water must be resolved against the carrier."

The Medea (CA, 9), 179 Fed. 781, 791.

Even where the damage to cargo has been found by survey or analysis to be fresh water, rather than salt water, it has been held that under the Carriage of Goods By Sea Act, 46 U.S.C.A. §1300, 1303(2) the burden is upon the carrier to account for the damage to cargo. *The Ciano* (E.D. Pa.) 69 Fed. Supp. 35. In that case, as in the present case, the respondent carrier sought to prove that the damage could not have occurred while the cargo was aboard the vessel. In fact, the court found that "the preponderance of the evidence eliminates certain possible causes of damage, as condensation and ship's sweat." *The Ciano*, 69 Fed. Supp. 35, 40. Nevertheless, the court went on to hold:

"The libelant's *prima facie* case of receipt on the "Ciano" in good condition must stand. The cargo was delivered in bad condition. The respondents have failed to show either that the damage did not occur aboard the vessel, or that however it occurred, it was not due to or contributed to by, the fault of the carrier, its agents or servants. Accordingly the libelant is entitled to recover herein."

The Ciano (E.D. Pa.) 69 Fed. Supp. 35, 40.

Appellant insists, however, that the lapse of time between actual discharge of the flour from the vessel, and its movement by rail a distance of a little over a mile to consignee's warehouse, before dam-

age was discovered or reported, leaves a "gap" which shifts the burden of proof as to the exact cause of the damage onto Appellee, the consignee. We find no authorities whatsoever cited in Appellee's brief to support this contention. Even if this contention were accepted as correct, we submit that Appellee has proved by ample, uncontradicted testimony that no salt water damage could have been sustained to the flour after discharge and while en route the short distance of one mile to Appellee's mill.

Thus checker Luiz, not an employee of Appellee, testified that the rail cars containing the flour were covered with canvas, in good condition, and well tied, as soon as loaded and "no rain could possibly damage the goods covered" (Aps. 55). Also, witness Luiz testified that it was doubtful whether any rail car remained on the dock more than two hours after loading (Aps. 56). On several occasions witness Luiz stated that the shipment was not exposed to rain (Aps. 55, 56, 58).

Other testimony established that the building where the flour was received and stored at Appellee's mill, before inspection and discovery of the damage, was designed for storage of flour, was of concrete construction, with ground floor one meter above the ground, and "no leakage or dampness was present at any time" (Aps. 100-1).

Appellant would have this court believe that the flour in this shipment, weighing 55,566 pounds by Appellant's own calculation and requiring "an immense quantity of water to saturate" (Br. 56) by Appellant's own statement, was damaged by salty tarpaulins, rain, spray from the seaside, or salt remaining in the rail cars from previous loads (Br. 30), although no testimony whatsoever was offered by Appellant to support such suggestions. Yet Appellant admits that "some unique disaster" might have caused a leak in the vessel, causing damage to the flour while still aboard (Br. 36).

But mere speculation, or a theory unsupported by evidence, is not enough to relieve Appellant as carrier from liability where damage by salt water has been proved. In *The Lassell* (EDNY) 53 F.(2d) 687, 1925 A.M.C. 1066, a shipment of raw linseed in bags was found upon discharge to have been damaged by salt water. The court said:

"There is, however, no evidence before me on which I can do more than guess at the cause that permitted the sea water to enter * * *

"I am compelled therefore to find that the claimant has not sustained the burden of proof as to the defenses asserted by it, and as libellant has made out a *prima facie* case, it seems to me it is entitled to recover."

The Lassell (EDNY) 53 F.(2d) 687, 688,
1925 A.M.C. 1066.

Certainly, speculation by Appellant in its brief as to the cause of damage to flour proved to have been

due to salt water contamination cannot stand as a substitute for facts that it is required to prove to relieve itself from liability.

Appellant's brief dwells upon the contention that no notation of damage was made in Customs house records at Rio de Janeiro, and that the court must accept this incident as satisfactory proof that no damage in fact existed at time of discharge (Br. 19). The plain and simple answer to this is that both the carrier's and the consignee's witnesses testified without contradiction that this particular shipment of flour did not pass through the Brazilian Customs Warehouse where such inspections *for damage* would ordinarily be made. Checker Luiz stated that "no one" checked this cargo *for damage* at time of discharge (Aps. 54, 58, 64). The only check was a tally as to quantity (Aps. 54). Captain Lane testified that the flour was priority cargo and was "taken directly to the customers *without weighing or inspection*" (Aps. 185). Chief Officer Parsons stated that he checked the hatches at time of discharge for condensation and "the only thing I looked for was any possibility of sweat" (Aps. 195). Appellant's Claim Agent at Rio de Janeiro, Mr. Caswell, testified that "no detailed inspection was made" at the time the flour was discharged at Rio de Janeiro (Aps. 220).

Lawyer de Camargo's testimony as to his knowl-

edge of the usual practice of inspection by Brazilian Customs officials for damage and the entry of notations of damage on Custom's registers is rendered unimportant because of the special circumstances mentioned above and the admission of Lawyer de Camargo that he had no personal knowledge of what was *actually done* on this particular shipment with regard to inspection for damage (Aps. 328, 331). Furthermore, Lawyer de Camargo admitted that it was "possible" that Brazilian Customs officials did not inspect this shipment of flour upon discharge for damage (Aps. 330).

Appellant attempts to escape liability by showing that no water was found in the deep tanks of the vessel, that pipe lines in the holds were not defective, that there was no sweat damage, no leakage through ventilators, hatches, hatch covers or tarpaulins on the vessel, and that the decks and sides of the ship were welded and not riveted and hence did not leak (Br. 20-22).

The inadequacy of such proof is illustrated by the remarks of the court in a similar case, involving salt water damage to bales of kid skins received aboard a vessel in good condition and found upon discharge to be in a "wet and stained condition." The court said:

"Respondent carrier contends that it should be exonerated from liability by reason of the

proof offered:—that the vessel was new, that it was on its second voyage only, that the shipment was stowed in the safest and driest place aboard for cargo of the kind, namely No. 5 hold 'tween deck, that during the voyage from Massawa to New York no sea or salt water entered the hold, and that upon completion of the voyage, an inspection of the hold at the time of unloading revealed no water in the hold and no dampness, outside of stains on the deck or floor as if made by approximately 9 bales.

* * *

“The shipment having been received aboard in good condition, the carrier was bound to discharge it in the same condition, unless it was excused by reason of some provision in the Carriage of Goods by Sea Act, 46 U.S. Code Sec. 1300 *et seq.* There is no evidence in this case sufficient to excuse or exonerate the carrier.”

George A. Pickett (SDNY) 77 Fed. Supp. 988; 1948 A.M.C. 453.

See also:

The Ciano (E.D. Pa.) 69 Fed. Supp. 35
and *The Medea* (CA, 9) 179 Fed. 781.

Similarly, the proof of features and characteristics of the S.S. “Sweepstakes” and of the apparent absence of any discernible defect in the ship, cannot avail the Appellant in this case to exonerate it from liability for damage which Appellee has affirmatively proved to have been caused by *salt water contamination* of the flour.

Appellant next seeks to destroy Appellee’s *prima facie* case by attacking the adequacy and reliability of the surveyor’s report and the chemist’s re-

port, Libelant's Exhibit 4 (Aps. 90), which formed the basis for Appellee's proof of salt water damage to the flour (Br. 27-30).

Significantly, with respect to the report and testimony of Dr. Barreto, this chemist, the trial court stated in its oral decision at the close of the trial, as follows:

"The court has no doubt of the correctness of the fact as to the nature of the damage as found by libelant's witness, Dr. Barreto. Everything connected with his deposition points to unquestioned credibility of his testimony, and I see no fact or proper inference of fact which to my mind would tend to dispute or undermine the truthfulness of his statements as to cause of damage." (Aps. 356)

Dr. Barreto testified to eminent professional qualifications by education, experience and present employment (Aps. 83). He described tests and procedures used by him in making the analyses of samples of flour (Aps. 85-93) which were recognized by even Appellant's expert witness, chemist Punett, as proper and sufficient tests to determine whether the flour had been contaminated by contact with salt water (Aps. 304). Chemist Punett admitted that Dr. Barreto was "a qualified chemist" (Aps. 303). The other chemist called by Appellant likewise conceded that the findings of Dr. Barreto, based on the tests which he performed, would be reliable (Aps. 255).

Appellant bases its attack and attempted impeachment of Dr. Barreto on the fact that his written report to the surveyor (Aps. 90) indicated that qualitative tests—for quality only—were made on samples of the flour, whereas Appellant's chemist testified that it would also be necessary to make quantitative tests—for percentage of chemical constituents—to accurately determine whether damage to the flour by wetting was in fact salt water contamination or whether it was fresh water or other moisture damage. Here again, Appellant emphasizes the failure to record the results of qualitative tests. But the clear and repeated testimony of Dr. Barreto is to the effect that he *did make a quantitative as well as a qualitative* analysis of the flour samples (Aps. 93). He also made comparative tests between salt-water-contaminated flour and flour intentionally contaminated with fresh water, as well as good marketable flour (Aps. 87, 93). All of his procedures, tests and findings used on these samples were checked, confirmed and found to be accurate and reliable by chemist Owens at Seattle, who testified for Appellee (Aps. 350). Chemist Owens, employed by Laucks Laboratories, testified to a long-standing experience and frequent testing of flour and cereal samples and stated unequivocally that he did not even consider that a quantitative analysis was necessary to determine salt water contam-

ination of flour, being of the opinion that qualitative tests used by Dr. Barreto were reliable in making such a determination (Aps. 334, 349-51).

The same type of qualitative report on a silver nitrate test for salt water damage, which is criticized by Appellant herein, was considered by the Court of Appeals for the Second Circuit in an admiralty case involving a shipment of cocoa beans claimed to have been damaged by salt water while being shipped from a Brazilian port to New York. In approving the report as adequate, the court said:

“By the conventional silver nitrate test, he (the surveyor) concluded that salt water had contributed to the damage. Broken down, the reactions to his tests were: ‘1 heavy salt, 4 salt, 5 light salt, 2 trace and 2 nil.’ * * * Furthermore, Elliott’s findings were to some extent corroborated by the results of Lynner’s tests, since out of 24 samples tested by him, half showed a slight chloride reaction. We think that there was sufficient evidence to permit the district court to find that the presence of sea water, by increasing amount of moisture which condensed in the holds, contributed to the damage.”

The Asturias (CA, 2) 126 F.(2d) 999, 1942
A.M.C. 360.

It will be noted that the same terminology was used in the surveyor’s report in the above case as in Dr. Barreto’s report in the present case.

B. WHETHER EXPERIENCE OF THE VESSEL ON THE PRECEDING AND SUCCEEDING VOYAGES IS RELEVANT TO THE ABOVE ISSUE (PROOF THAT FLOUR WAS WET FROM SEA WATER AT DESTINATION)

Appellant acknowledges that the trial court has "wide discretion in determining the scope of [such] indirect evidence" (Br. 33). Yet Appellant claims on this appeal that the trial court committed error in rejecting indirect proof of this type which was offered on behalf of the carrier (Br. 32). The trial court repeatedly invited counsel for Appellant to cite authorities in support of the offer of such testimony, but none were furnished during the trial, and none are contained in Appellant's brief on this appeal (Aps. 141, 143, 146, 178; Br. 32-38). Appellee did offer the trial court authorities to support its objection (Aps. 140).

In exercising the "wide discretion" which Appellant concedes is possessed by the trial court, the District Judge indicated the sound reasoning upon which its ruling excluding the evidence was based as follows:

"The vessel might have been ever so staunch, strong and tight on the voyage which immediately preceded arrival at the port where she took on the cargo in question, but within a mile of such port arrival she might have run on rocks and sprung some leaks. Anything like that is in the realm of possibility, and it seems to me it is not proof. It is a question of what

was her condition at the time of her loading this cargo and thereafter." (Aps. 145, 146)

The same attitude by the trial court toward such evidence was expressed in *The Ensley City* (D.C. Md.) 71 Fed. Supp. 444, 1947 A.M.C. 568; Aff'd. (CA, 2) 170 F.(2d) 25, 1948 A.M.C. 1589. This was an admiralty action brought against the water carrier to recover damages to a cargo of licorice extract. The trial court excluded from evidence certain temperature records recorded in the holds of the vessel on a prior voyage, which the carrier sought to introduce to dispute the claim of the cargo owner of damage by excessive heat. The court held that substantially similar conditions had not been shown to have existed on the different voyages and that too many other factors might affect the temperature readings, and hence the records of temperatures on other voyages were excluded as having little or no "probative weight." The decision of the trial court was affirmed on appeal.

The general rule on this subject is stated in 32 C.J.S. under EVIDENCE, §583, as follows:

"In the absence of a showing that the essential conditions were the same, an issue as to the existence or occurrence of a particular fact, condition, or event, cannot be proved by evidence as to the existence or occurrence of other facts, conditions or events although they may be, in some respects, similar."

32 C.J.S., EVIDENCE, §583, p. 438.

In *The Richelieu* (CA, 4) 48 F.(2d) 497, 1931 A.M.C. 721, an admiralty action involving a pitch dust explosion and fire aboard a ship, while loading a cargo of pitch, the respondent sought to show that it had loaded other products in previous years under the same conditions without mishap. The appellate court held that such evidence was not admissible and said:

“And the fact that no explosion resulted in the loading of the coal is not conclusive that the methods employed were such as in the exercise of due care should have been used even there.”

The Richelieu (CA, 4) 48 F.(2d) 497, 1931 A.M.C. 721.

We submit that the type of testimony offered by Appellant as to conditions and cargoes of other commodities carried on prior and subsequent voyages of the “Sweepstakes” was properly excluded by the trial court under the above authorities. It was also properly excluded from the case in the exercise of the “wide discretion” which even Appellant concedes the trial court possesses on such matters. Consequently, Appellant cannot persuasively argue that it was prejudiced by these rulings of the trial court excluding such evidence.

C. NOTICE OF SURVEY

Appellant contends that Appellee, as libellant, failed to give the carrier’s agent at Rio de Janeiro

proper notice of the damage and afford an opportunity to the carrier's representatives to survey, test or sample the damaged flour. The finding of the trial court to the contrary is assigned as error by Appellant on this appeal (Br. 38).

The uncontradicted facts are that the following letter was sent by Appellee to Appellant's agent at Rio de Janeiro on March 2, 1946, which letter is in evidence as Libelant's Exhibit 3 (Aps. 19). A translation of this letter from Portuguese into English was read into the record by stipulation of proctors (Aps. 63) and is as follows:

"* * * letter of March 2, 1949, from Companhia Luz Stearica, Sec. Moinho da Luz, Rio de Janeiro, Brazil, to Moore-McCormack, S.A., at a street address in Rio de Janeiro.

" 'Gentlemen: Ref.: 10,500 sacks with 252,000 kilos of flour shipped in New York on the steamship "Sweepstakes," corresponding to bills of lading dated 1/31/36. Having noted a certain number of torn sacks with loss of contents, and as many more wet, on the unloading of the flour under reference, we are advising you that we hold the steamer's owners responsible, as transporters, for the averages above mentioned.

" 'There being nothing further, we are, Yours respectfully, Companhia Luz Stearica, Sec. Moinho da Luz' by a director." (Aps. 64)

Appellant's agent at Rio de Janeiro replied to the above notice on March 9, 1946, and this letter is in evidence as a part of Libelant's Exhibit 3 (Aps. 63) and a translation from Portuguese into English,

agreed upon by proctors was read into the record (Aps. 64) as follows:

"* * * Moore-McCormack's letterhead, at Rio de Janeiro, dated March 9, 1946, to Messrs. Moinho da Luz, Cia Luz Stearica, at Rio de Janeiro.

" 'Ref.: S.S. 'Sweepstakes,' V-12S 10,500 sacks of flour. Gentlemen: In reply to your favor of the 2nd inst., we must inform you that according to the registers of defects and averages of the Wharf Warehouse, the packages above were unloaded in perfect condition, the which exempts us from any responsibility.

" 'There being nothing further, we are, Yours sincerely, Moore-McCormack (Navagacao) S/A., Representative of the Moore-McCormack Lines, Inc., agent of the "War Shipping Administration" of the U.S.A., By: A. M. Caswell, Dept. Defects and Averages.'" (Aps. 64-65)

A reading of these two letters would seem to furnish a complete answer to Appellant's claim that no notice of claimed damage or opportunity to survey and test the flour was given to the carrier's representative at Rio de Janeiro. Certainly the consignee is not under an obligation to insist upon an examination and survey being made by the carrier's representatives. Having sent prompt written notice to the carrier and having received a reply from its agent prior to the completion of the tests and survey, it would seem that the Appellant was entitled to accept the carrier's denial of liability as sufficient.

Appellant's claim agent, Mr. Caswell, testified

that Appellant did not request an opportunity to inspect the flour *after receipt of notice* of the damage claim (Aps. 230). He further testified that Appellant was not denied an opportunity to inspect the damaged flour (Aps. 230).

How can Appellant now claim that it was prejudiced by lack of opportunity to inspect and test the damaged flour under the above circumstances?

In *The Caledonier* (SDNY) 60 F.(2d) 562, 1932 A.M.C. 954, the carrier made a similar claim that it received no notice of the survey of damaged cargo. In disposing of this contention the court said:

“As for the objection that the respondent received no notice of a survey, there was no survey in the sense that a vessel is surveyed. All that libelants did was to have an expert make an examination of the goods and give estimates. *They gave the respondent an opportunity to make an inspection.* This exception is wholly without merit.” (Italics added for emphasis)

The Caledonier (SDNY) 60 F.(2d) 562, 563, 1932 A.M.C. 954.

D. EXTENT OF DAMAGE

Appellant's assigned errors as to damage fall within the following categories:

1. That there was insufficient proof of damage to the extent of 35% of sound market value.
2. That there was insufficient proof as to no salvage obtained or obtainable on the damaged flour. (Br. 40-46)

In urging the above assigned errors, Appellant seeks to discount the testimony of surveyor Ramos and Dr. Barreto, suggesting, among other things, that surveyor Ramos was not experienced or qualified, and did not make adequate tests to determine the extent of damage to the flour.

The record shows, however, that Ramos was an *independent* surveyor, employed by Companhia Imobiliaria Financiera Americana (Aps. 66), and not employed by Appellee. He testified to ten years' employment by the same company in the same capacity and stated that his experience was practical (Aps. 67).

Surveyor Ramos made two inspections of the flour shipment on separate days (Aps. 68). He testified fully and in detail as to the nature and type of damage found in the bags of flour (Aps. 69, 75). He readily admitted that no pattern or system could be noted (Aps. 76).

Surveyor Ramos testified that the damaged bags of flour were segregated in fifteen separate piles and counted. Samples were taken at random from six of the damaged bags of flour (Aps. 69), and these samples were not only of the bag material and hardened crust near the surface but also of the flour contents to a depth of five centimeters (Aps. 76).

Although Appellant protests the finding of 35%

damage, based on the Ramos survey and Barreto analyses, it is interesting to note that this percentage is *less* than the percentage of damage finally agreed to between the surveyor and Appellee, namely, 40% (Aps. 75). The various factors, such as percentage of actual damage, additional labor required and cost of new flour bags, which were considered by Ramos in making his estimate were fully covered by Appellant's own interrogatories to this witness and his candid answers thereto (Aps. 81-82).

Proving the extent of damage by the above type of testimony has been sanctioned and approved in similar admiralty cargo damage cases. *The Caledonier* (SDNY) 60 F.(2d) 562, cited by Appellant on this point (Br. 45) demonstrates the sufficiency of such proof by surveyor's estimate. In that case the trial court was called upon to settle a Commissioner's report as to damage to bales of skin. The court said in part:

"The second exception is that the commissioner based his findings on a rough estimate made at an *ex parte* survey of which the respondent received no notice. In my opinion the evidence before the commissioner was adequate to support his finding as to the amount of damage done to the cargoes. The examination made by Baker was sufficiently thorough. He was skilled in the work, and it would be unreasonable to expect him to examine every skin."

The Caledonier, 60 F.(2d) 562, 563, 1932 A.M.C. 954.

Similarly, in *The Carso* (EDNY) 1933 A.M.C. 1357, the court referred with approval to the decision of the court in *The Caledonier*, *supra*, on this point and went on to say:

“Moreover, there must be a reasonable procedure in such matters, and the rule which would be observed where loss or injury to 10 horses was involved, would not apply to 572 cases of cheese, the marketability of which would be determined by group rather than unit sale.”

The Carso (EDNY) 1933 A.M.C. 1357, 1359, Aff'd. 69 F.(2d) 824, 1934 A.M.C. 354; Cert. den. 292 U.S. 647, 78 L. Ed. 1497, 1934 A.M.C. 828.

In answer to Appellant's argument that lack of salvage value was not proved we call attention to the testimony of witness Ferreira who stated:

“It was impossible to sell the flour * * *”
(Aps. 103)

and the testimony of witness Herold, who stated:

“We have never done so [sold damaged flour], and I believe that this is prohibited by law. We have never sold any damaged flour.”
* * * (Aps. 119) (Portion in brackets added for clarity)

“I understand this question to refer to the flour actually damaged by water; if so, I believe it is quite unsaleable. I understand that *it is always thrown away*.” (Aps. 119) (Italics added for emphasis)

And again the same witness stated:

"No value was realized from the damaged portion." (Aps. 126)

In *The Rosalia* (SDNY) 1931 A.M.C. 886, a similar contention as to determination of extent of loss to bales of tobacco damaged by water was considered. The court said:

"I am not impressed by the argument that the libelant should have sold the damaged tobacco at auction to determine the loss. There is little doubt that such a procedure would have greatly increased the damages which the libelant was bound to mitigate. The general method adopted of seeking to discover the portion of the tobacco which was actually damaged and to calculate the loss in that way is one which must commend itself. A businesslike attempt to hold a fair appraisal by competent men was made, but the claimant refused to take part or even attend. It is true that the damage to the New York bales was found by an estimate based upon the proportion of the volume of each bale that appeared on examination to be damaged, but this was done by trained men who had expert knowledge."

The Rosalia (SDNY) 1931 A.M.C. 886.

The above ruling was approved and affirmed by the Court of Appeals, Second Circuit in 264 Fed. 285.

The determination of nature and extent of damage to a shipment of cocoa beans by the same process as used here was approved by the Court of Appeals, Second Circuit in *The Asturias, supra*, a 1943 decision.

Having been given an opportunity to inspect and

check the damaged flour by Appellee's letter of March 2, 1946 (Aps. 64), which opportunity Appellant declined, it would hardly seem appropriate for Appellant to now argue that the opinion of its Seattle witness, Mr. Gow, who never saw the damaged flour, should be substituted for the testimony of two reliable witnesses (Dr. Barreto and Mr. Ramos) who actually saw and calculated the loss on the flour at Rio de Janeiro.

E. EVIDENCE OF MARKET VALUE

Appellant contends that there was insufficient proof of a sound market value per bag of flour at destination of 126 cruzeiros, Brazilian funds, which at the then prevailing rate of foreign exchange would have been \$6.62 U. S. per bag (Br. 46).

Appellant's argument is based on the contention that witness Herold testified to a value per bag of 137 cruzeiros but that the witness failed to produce the record or government price control list upon which his statement of selling price was based (Br. 53; Aps. 121, 126, 135).

The complete answer to this claim of error may be found in the statement of Mr. Wakefield, proctor for Appellant, made in open court, and appearing in the printed Apostles, as follows:

"In justice to my client I can't say that I will admit it was 137 cruzeiros, *I will admit it*

was 126 cruzeiros." (Aps. 132) (Italics added for emphasis)

Proctors for Appellant have estopped themselves from claiming any failure of proof of sound market value by the above statement made during trial in open court.

On the basis of the above statement, Appellee's proctors limited the value per bag in the Findings of Fact and in calculating the amount recoverable in the Decree to 126 cruzeiros per bag (Aps. 29, 32). This was done at the request of the trial court to have the detail as to the amount of damage in U. S. dollars computed by proctors (Aps. 357-8). The value of 126 cruzeiros per bag had previously been stated by Appellee in one of its answers to Appellant's interrogatories before trial and before the deposition of witness Herold had been taken at Rio de Janerio (Aps. 17-18).

III.

ARGUMENT IN SUPPORT OF THE DECREE

Sufficient detail as to salient facts and testimony in support of the Decree has been heretofore set out by Appellee in answer to argument of Appellant.

Having proved delivery of the flour to the carrier in good order, receipt of the flour at destination in damaged condition and having introduced reliable testimony of qualified experts that the damage was

due to salt water contamination to the extent of at least 35% of the 3087 bags of damaged flour, we submit that Appellee was entitled to the decree entered by the trial court, since Appellant failed to prove the cause of the damage to be within any of the exceptions of the Carriage of Goods by Sea Act or the bill of lading contract.

In a very recent cargo damage case tried before the same District Judge as the present case and appealed to this court, *Apex Fish Co. v. U. S. A.* (CA, 9) 177 F.(2d) 364, 1949 A.M.C. 1704, this court said:

“And since we hold that Apex successfully established such good order and condition at the time of loading, the doctrine of *Schnell v. The Vallescura*, 293 U.S. 296, 1934 A.M.C. 1573 at page 1577, applies:

“ ‘If he (the carrier) delivers a cargo damaged by causes unknown or unexplained which had been received in good condition, he is subject to the rule applicable to all bailees, that such evidence makes out a *prima facie* case of liability. It is sufficient, if the carrier fails to show that the damage is from an excepted cause, to cast on him the further burden of showing that the damage is not due to failure properly to stow or care for the cargo during the voyage.’ *The Medea* (9 Cir.) 179 Fed. 781. This burden was not sustained.”

Apex Fish Co. v. U. S. A. (CA, 9) 177 F. (2d) 364, 1949 A.M.C. 1704, 1710.

IV.

CONCLUSION

We submit that the lower court's findings as to receipt by the carrier in good order and delivery at destination in bad order with salt water damage are amply supported by the evidence. Furthermore we submit that the Appellant has failed to prove any cause for the salt water damage which would come within the exceptions or exemptions of the Carriage of Goods by Sea Act or the bill of lading. Lastly, we submit that the damages allowed by the decree in the sum of \$6,774.42 U. S. funds have been adequately proved or are admitted and agreed to by Appellant.

We, therefore, submit that the decree of the trial court should be affirmed.

Respectfully submitted,

LANE SUMMERS,

CHARLES B. HOWARD,

SUMMERS, BUCEY & HOWARD,

Proctors for Appellee.

No. 12510

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For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

CIA. LUZ STEARICA, a Corporation
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT
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REPLY BRIEF OF APPELLANT
UNITED STATES OF AMERICA

J. CHARLES DENNIS,
United States Attorney.

BOGLE, BOGLE & GATES,
CLAUDE E. WAKEFIELD,
M. BAYARD CRUTCHER
(Of Counsel)

Proctors for Appellant.

603 Central Building,
Seattle 4, Washington.

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REPLY BRIEF OF APPELLANT
UNITED STATES OF AMERICA

I.

WHAT IS THE ISSUE?

A reply is in order.

We said in the opening brief that the evidence, wholly and impartially viewed, does not support the Court's finding that the flour in question was wet with seawater when lifted from the holds of the "SWEEPSTAKES" at Rio. (Aps. 357)

Appellee declines to discuss this issue. Instead,

it states another "question" (Br. 5)—to which there has been only one answer since *Clark v. Barnwell*, 12 How. 272, 13 L. ed. 985—and cites a host of cases all presupposing actual damage on outturn. Throughout its argument, Appellee identifies these cases with the one at hand, as though they dealt with the same question. See, for example, treatment of *The Ciano* on page 8 of Appellee's brief.

Such a muddling of the focal issue can only distract the Court.

To make the point clear, we briefly summarize the cases relied upon by Appellee, in order of citation:

United States v. Apex Fish Co. (CA, 9), 177 F. (2d) 364, 1949 A.M.C. 1704: Concealed damage to salt herring, found to have been in good condition at time of loading. "That (the herring) outturned at Seattle in a damaged or deteriorated condition is unquestioned." 1949 AMC, 1704.

The Astri (CA, 2), 151 F. (2d) 5, 1945 AMC 1064: Iron plates being discharged at Buenos Aires were seen by consignee's employee and a tally clerk to be wet with acetic acid, which had leaked from a drum stowed over the iron.

The Medea (CA, 9), 179 Fed. 781: "On arrival of the bark at San Francisco, it was found that much of the cargo had been damaged by salt water * * *."

(782)

The Folmina, 212 U.S. 354, 29 S. Ct. 363, 53 L. ed. 546: “* * * when discharged in New York, a large part of it (bags of rice) stowed on the starboard side of the hold was found damaged.” 212 U.S. 360.

The Ciano (E.D.Pa.), 69 F. Supp. 35: “When the paprika was discharged at Philadelphia, 235 of the 500 bags were found to have been damaged” (stained and discolored). (36, 37)

The Lassell (EDNY), 53 F.(2d) 687, 1925 AMC 1066: “When the said steamship arrived at New York and was unloaded, the linseed, some of which was in bags and some in bulk, and stowed in the bottom of Hold No. 1, was found badly damaged by sea water. In fact, it seems beyond dispute, that there was a large quantity of sea water then in the hold and that this had caused the damage. The question litigated was, how did this water get into the hold?” 1925 AMC, 1066.

George A. Pickett (SDNY), 77 F. Supp. 988, 1948 AMC 453: “When * * * the cargo was discharged, it was found that 32 bales (kid skins) out of the 265 delivered were ‘in a wet and stained condition’.” (453)

Schnell v. The Vallescura, 293 U.S. 296, 55 S. Ct. 158, 79 L. ed. 367, 1934 AMC 1573: “Apparently good when shipped, the onions were in an advanced stage of decay when delivered (in New York), and

it is for this that recovery is sought." 1929 AMC, 1410 (SDNY).

It is self-evident that such cases of cargo *damaged on outturn* deal with the burden of proof upon the vessel-owner to show a defense under his bill of lading.

In the case at hand, by contrast, the bags of flour were discharged onto rail cars at the dock¹ in apparent good order and condition. (Evidence summarized in opening brief, pp. 15-19.)

Additionally, consignee gave no notice of damage until March 2, seven days after the last of the flour was delivered from the vessel. (Aps. 64, 217) There was full opportunity for consignee to ascertain damage immediately on outturn.

In this circumstance, Section 3 of the Carriage of Goods by Sea Act applies.

"(6) Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of

¹ The cars were supplied by the Port Administration (Aps. 60, 81, 219), apparently on the order of consignee (Aps. 60, 218, 219). At any event, the flour was then beyond the control of the vessel, and delivered with the same effect as though it were delivered to Customs directly. (Aps. 219, 221)

Delivery of ocean cargo to Brazilian customs is the practice, as implied by witnesses Caswell and de Camargo and appellee's attorneys. (e.g. Aps. 329) The effect thereof as delivery to consignee was established as early as *The Asiatic Prince* (CA, 2) 108 Fed. 287, cert. den., 183 U. S. 697, 22 S. Ct. 933, 46 L. ed. 395.

The bills of lading provide: "The responsibility of the Carrier in any capacity shall altogether cease and the goods shall be considered to be delivered and at their own risk and expense in every respect when taken into the custody of Customs or other authorities." (Clause 12, Ex. 1)

the person entitled to delivery thereof under the contract of carriage, such removal shall be *prima facie* evidence of the delivery by the carrier of the goods as described in the bill of lading." 46 U.S.C. §1303(6).²

It is in such circumstances that we say: consignee must have proved by a preponderance of the evidence that the flour was wet when discharged. It is this question of *sufficiency of proof* which is the focal issue in the case.

II.

REPLY TO APPELLEE

A. WAS FLOUR WET WHEN DISCHARGED?

1. LIBELANT'S BURDEN OF PROOF.

Respondent denied that the flour was wet upon delivery. Libelant had to prove it to make out a case.

"The burden of proof, as a principle of general jurisprudence, is assumed by the libelant unless the cause of action is confessed or admitted judicially by the respondent." 1 Am. Jur. 604, Admiralty, §109, adopting language of *The L. P. Dayton*, 120 U.S. 337, 7 S. Ct. 568, 30 L. ed. 669.

This principle of course applies to cargo damage claims. *The Dondo* (SDNY), 287 Fed. 239: "The shipper must show damage while in the carrier's hands and it is only an excuse, e.g., an exception

² The identical language of Clause 18 of the bills of lading. (Ex. 1)

in the Bill of Lading that the carrier must allege and prove.”

Pan-American Hide Co. v. Nippon Yusen Kaisha (SDNY), 13 F.(2d) 871, per Judge Learned Hand: “The libelant has that burden (of proof) on the issue whether the goods were damaged in the carrier’s custody.”

A specific illustration of this principle is *Globe Distributing Co. v. S.S. Monte Iciar* (E.D.Pa.), 67 F. Supp. 201, 1946 AMC 1354.

Barrels of Spanish wine were discharged from the ship at Philadelphia. The dunnage and floors of the holds were found clean and dry. None of the barrels were observed to be leaking during discharge. When they arrived in Baltimore, by rail, some of the barrels were leaking badly.

Libelant in that case made the same argument here advanced—that the burden was upon the respondent to explain or excuse the damage under one of the exceptions in the Carriage of Goods by Sea Act. (1359)

The Court rejected such contention.

“How, then, do the facts of the instant case bring it within the purview of the Carriage of Goods by Sea Act? This libel is based upon the loss of contents from certain barrels of wine. There is no evidence that the barrels were leaking at the time they were loaded aboard ship. If, as is frequently the case, the loss had been apparent upon discharge of the cargo, I would have no doubt that the Carriage of Goods

by Sea Act would govern respondent's liability. However, in the instant case, there is no evidence whatever of any loss of contents or damage to the barrels at the time they were discharged. An inspection of the 'tween decks, where libelant's cargo had been stowed, showed that that space was clean and dry.

"The first evidence of any loss of contents from libelant's shipment was the gauging of seven of its barrels on the pier by the United States Customs authorities on April 17, 1944, at the time the shipment was delivered to libelant's agents, which was four or five days after the discharge of the cargo. I do not think that these facts alone bring libelant's loss within the purview of the Carriage of Goods by Sea Act."

2. CONFLICTS IN ARGUMENT.

REPRESENTATION.

Appellee commences its argument (Br. 6) with the suggestion that it was not represented at discharge from the "SWEEPSTAKES." Its own evidence shows that it paid Cr.\$ 3,973.80 for "discharge checking expenses." (Aps. 122)

What are checkers for? To count the outturn, and note any apparent damage. This is common practice the world over, as Appellee very well knows. It is proved in this case (testimony of Caswell, answer to 18th interrogatory, Aps. 221). Unlike practice in the United States, the notation of damage upon discharge is *required by the customs laws*, in Brazil (testimony of de Camargo, Aps. 324).

THE WEEK-LONG RAIL JOURNEY.

Appellee next tries to gloss over the absence of evidence as to what happened to the flour during its rail carriage. It speaks of "ample, uncontradicted testimony" (Br. 9)—but makes no reference to the Apostles. The *only* testimony is of checker Luiz, who said: "I played a very small part in unloading this shipment. I supervised the removal of only part of a shipment, say a carload on the entire shipment." (Aps. 54, 55) "I saw only one wagon." (Aps. 55)

He said directly: "I don't know" whether the shipment was damaged by rain. (Aps. 57)

It *did* rain while the flour was in the open cars. (Exhibit A-1, deck log book, entries at Rio, February 21—heavy shower, light to heavy rain, very heavy rain; February 22—rain; February 23—rain.)

Caswell stated as his surmise, from the facts: "Such damage could have been caused through flour becoming wet while waiting in rail cars, through faulty tarpaulins, or through consignee's discharging at their deposit in rain." (Aps. 225, 227)

The surveyor Gow testified, as opinion, from a description of the damage, that bags spotted to various degrees implied "a sprinkling condition." (Aps. 272)

BEGGING THE QUESTION.

We next comment upon the argument starting top of page 10. We of course do not believe that 61,250 pounds of flour were saturated—that is what the Court charges against the Appellant. Nor do we say all the damage came from the possible sources referred to on page 30 of our opening brief. We sought there only to suggest that salt does not inevitably mean sea water. Barreto examined two samples (if his report is believed) or six samples (if his latter-day testimony is believed). These samples were inadequate to represent the whole. (Aps. 296) Appellee yet persists in referring to “salt water damage” (Br. 6) and “liability where damage by salt water has been proved” (Br. 10) and “damage to flour proved to have been due to salt water contamination” (Br. 10, 11) and “damage which Appellee has affirmatively proved to have been caused by salt water contamination of the flour” (Br. 13) as though by weight of words it could overcome its dearth of facts.

BARRETO'S VERACITY.

Appellee says we “attack” its chemist’s report. (Br. 13) We did not. We compared Barreto’s report with his testimony, without comment. (Our brief, pp. 27, 28) The shoe pinched maybe.

But when Appellee cites Punnett and Williams as

supporting Barreto (Br. 14) we draw a line.

All *three* chemists testified that the Barreto report did *not* reflect a quantitative analysis.

Punnett:

"I can only form an opinion, if quantitative figures had been submitted by Dr. Barreto as to the amounts of sodium chloride present. *The original report indicates that only qualitative tests were made.* In the subsequent deposition he states he made quantitative determinations. The interpretation of those determinations will depend upon the relation of the quantitative results as expressed in figures, usually in percentage." (Aps. 311, 312)

Williams:

"This is a qualitative analysis." (Aps. 238) I cannot tell from the report whether the damage in this case was due to sea water "because of the lack of quantitative data to support such a conclusion." (Aps. 246)

Owens:

"Q. In Dr. Barreto's report, which you say you have examined, based upon what you see in that report, namely, his statement, 'The analysis made on two samples of wheat flour * * *,' with the marks so and so, 'gave the following result,' and he lists 'Chlorites * * * Presence, Sulfates * * * Traces,' and so on, would you say from that report Dr. Barreto had made a quantitative analysis?

"A. No, sir.

Q. He did not make a quantitative analysis?

"A. Not on the basis of what that says, no."

It was this failure to put his results in proper form (if Barreto did make quantitative and com-

parative analyses, as he says³) which provoked criticism by Williams and Punnett.

Punnett:

"I would say that any other chemist or consultant would be unable to decide whether or not Dr. Barreto's conclusion was justified unless Dr. Barreto had submitted the actual results of his quantitative determination. I would assume, as a matter of general professional practice and custom, that Dr. Barreto had these figures in a notebook or some other record, and that he could have submitted the figures." (Aps. 313, 314)

"I certainly would feel that in such a case, even though Dr. Barreto was not acting for any governmental bureau or department, it would be essential and good professional conduct to retain the figures and records of his actual determination." (Aps. 315)

Williams:

"* * * My opinion is that competency would necessarily include quantitative data in order to support his conclusion. Presumably, Dr. Barreto has testified that he did conduct quantitative data. My only opinion is, why didn't he report it? In any legitimate report, in my own experience, it is necessary to prove what you have to say, and our only proof in analytical chemistry is by the presentation of quantitative data. That is our only way of proving anything we say." (Aps. 254)

If the Court please, this is a matter of elemental scientific method. Julian Huxley levels precisely the

³ Appellee's witness Ramos testified—"I do not think such an examination was made" (quantitative analysis of damaged and sound flour). (Aps. 78)

He further testified that he did not believe any analysis was made of the sound flour. (Aps. 77)

same complaint against Trofim Lysenko, the Russian biologist:

"I at first imagined," writes Dr. Huxley, "that there might be something in Lysenko's claims. However, the more I heard and read, the clearer it became that Lysenko and his followers are not scientific in any proper sense of the word—they do not adhere to recognized scientific method, or employ normal scientific precautions, or publish their results in a way which renders their scientific evaluation possible." (From Huxley's "Heredity East and West," as quoted in *The Seattle Times*)

The above sketch of chemists' testimony shows the reason for Appellee's digression to build up Barreto. The whole flimsy structure of the trial Court's speculation stands upon the supposed integrity of Barreto.

The matter is not relevant to our argument (as the Court will note from our brief, p. 29)—we assumed all that Barreto said, namely, that 6 of the 3,087 damaged bags were in contact with salty water at some time before being sampled.

B. WHETHER EXPERIENCE OF THE VESSEL ON THE PRECEDING AND SUCCEEDING VOYAGES IS RELEVANT TO THE ABOVE ISSUE.

Nothing in the answering brief appears to require a reply. Neither the trial Court nor Appellee seem to grasp the distinction between circumstantial evidence and proof.

C. NOTICE OF SURVEY.

It seems to us that the facts stated in our opening brief speak for themselves.

D. EXTENT OF DAMAGE

We made no conscious effort to discredit the witness Ramos. We stated the facts. (Our brief, pp. 41, 42) The facts seem to embarrass Appellee.

Appellee represents to the Court that "Ramos was an *independent* surveyor." (Br. 23, emphasis theirs)

What does Ramos say?

"When merchandise insured by our company arrives damaged, I survey it." (Aps. 67)

He describes the damage.

"An additional 197 bags were torn but not damaged by water. These bags were not considered because they were not covered by the insurance." (Aps. 68)

Ramos dickered with Cia. Luz to settle this loss. (Aps. 75)

We respectfully submit that he was *not* an "independent surveyor." He made no claim to experience with flour salvage, or to knowledge of costs of reconditioning. He made no effort to determine *actual* disposition of the 3,087 bags of flour. He did *not* take the necessary steps to establish an accurate estimate of loss. Our opening brief covers the matter, pp. 43, 44, 45.

Barreto the chemist is drawn in to double as a surveyor. (Br. 23, 24, 27) His qualifications as such do not appear in the record.

Lastly, Appellee purports to answer the demand for data on reconditioning by implying the flour was thrown away! (Br. 25) Of course the damaged flour was thrown away. It was segregated from the great mass of good flour in the 3,087 bags. The good flour was rebagged and sold by Cia. Luz. (Aps. 104, 112, 119)

How *much* flour was re-bagged?

How much did it *cost* to segregate the good flour and re-bag it?

This is the real measure of Appellee's loss.

E. EVIDENCE OF MARKET VALUE.

Appellant made no such stipulation as is claimed by Appellee on page 28.

The record, which Appellee did not quote accurately, speaks for itself.

III.

ADDENDUM

Our opening brief states that the holds in question contained 2,315 sacks of flour consigned to others. (Br. 10) This was an inadvertent error.

We also emphasized that there was *no* flour or

other cargo water-damaged on this voyage. (Br. 16, 17, 18)

To give the Court a clearer picture of the cargo, and its significance upon the focal issue, we respectfully submit the following details of stowage in the holds in question. The sources are Exhibits A-2 (stowage plan) and 2 (hatch lists).

NO. 1 UPPER 'TWEEN DECK HOLD.

1300 BAGS FLOUR (less than 1000 CLS)⁴
 4 pkgs. household goods
 13 pcs. baggage
 28 pkgs. general cargo
 78 drs. insecticide
 reels wire
 steel sheets
 tinplate
 15 cs. machinery
 8 cs. refrigerators

NO. 2 UPPER 'TWEEN DECK HOLD.

5767 BAGS FLOUR (2300 CLS)
 490 bags cement
 12 unboxed Ford automobiles
 tinplate
 steel sheets, tubes, pipe, bars, springs

NO. 3 UPPER 'TWEEN DECK HOLD.

2350 BAGS FLOUR (less than 2350 CLS)
 2086 bags mail
 1147 pkgs. special cargo

⁴ The hatch lists show 7425 bags of CLS (Cia. Luz Stearica) and Pillco Fadex flour stowed in various holds under mixed marks. They also show the stowage of 4265 bags of CLS flour only.

For example: The last hatch list (Ex. 2), the only one for CLS flour in No. 1 UTD, shows 1000 bags CLS and Pillco Fadex. The number of bags of CLS in No. 1 UTD is conceivably 1 to 999.

The stowage plan shows 1300 bags of flour of all marks stowed in No. 1 UTD.

8 unboxed Ford automobiles
 1 unboxed Buick automobile
 2 unboxed tractors
 48 cs. machinery parts
 tinplate

NO. 4 UPPER 'TWEEN DECK HOLD.

7890 BAGS FLOUR (between 3274 and 4465
 bags CLS)
 66 crts. household goods
 70 pkgs. general cargo
 60 cs. photo supplies
 16 pkgs. agricultural parts
 1160 cs. tinplate
 877 kegs track pikes
 steel beams, sheets, conduit
 213 bdls. galvanized iron sheets
 ctns. glassware

NO. 4 LOWER 'TWEEN DECK HOLD.

6550 BAGS FLOUR (less than 1575 CLS)
 552 rolls newsprint
 500 cs. canned milk
 50 ctns. shoe polish
 128 pcs. frames

In summary, there were 22,857 bags of flour in the five holds mentioned. Of these 10,500 (or 46%) were consigned to Cia. Luz Stearica.

Respectfully submitted,

J. CHARLES DENNIS,
United States Attorney.

BOGLE, BOGLE & GATES,
 CLAUDE E. WAKEFIELD,
 M. BAYARD CRUTCHER
 (Of Counsel)
Proctors for Appellant.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

J. GERALD WILLIAMS,
Territorial Attorney General,
Juneau, Alaska.

HENRY RODEN and
WILLIAM L. PAUL, JR.,
Juneau, Alaska,
For Appellants.

FAULKNER, BANFIELD & BOOCHEVER,
ROBERT BOOCHEVER,
Juneau, Alaska,
For Appellee.

In The District Court for the Territory of Alaska
Division Number One at Juneau

No. 6084-A

ALASKA PACKERS ASSOCIATION,
Plaintiff,
vs.

ALASKA INDUSTRIAL BOARD, Composed of
HENRY BENSON, Chairman; GERALD
WILLIAMS, Attorney General of the Terri-
tory of Alaska, and FRANK BOYLE, Auditor
of Alaska, and ALFRED J. PETERSON,
Defendants.

COMPLAINT AND APPEAL FROM AN
AWARD OF ALASKA INDUSTRIAL
BOARD UNDER THE "WORKMEN'S
COMPENSATION ACT OF ALASKA"

Comes now the plaintiff and respectfully appeals to the District Court for the Territory of Alaska, First Judicial Division, from that certain award, hereinafter mentioned, of the Alaska Industrial Board, and complains and alleges as follows:

I.

That plaintiff is a corporation organized under the laws of the State of California, and existing under said laws, and that during all times hereinafter mentioned it was and now is engaged in the fishing industry in the Territory of Alaska, and is authorized to do business in the Territory of Alaska.

II.

The plaintiff has paid unto the Territory of Alaska its annual corporation tax last due, and has complied with all the laws of said Territory which are prerequisite to its bringing actions in the District Courts of Alaska.

III.

That the defendant, Alfred J. Peterson, was employed by the paintiff as a deck hand. He was originally so employed as such a deck hand aboard the vessel "Brant," which departed from Blaine, Washington, for Alaskan fishing waters in April, 1947. On June 19, 1947, he was transferred as a deck hand to the M/V "Rail." Said vessels were at all times operated in navigable waters of the United States, and the defendant Alfred J. Peterson had no duties to perform ashore, and at no time did he perform any work ashore. While so [1*] employed aboard the M/V "Rail," the defendant Alfred J. Peterson alleges he was injured on July 10, 1947, while carrying a sack of coal on the deck of said vessel. The sack of coal which said defendant alleges he was carrying when he sustained his alleged injury was for use in the galley stove of said vessel.

IV.

On September 24, 1948, the said Alfred J. Peterson filed an application for adjustment of claim with the defendant Alaska Industrial Board.

V.

A hearing before the full membership of the

* Page numbering appearing at bottom of page of original Reporter's Transcript.

Alaska Industrial Board was held in Juneau, Alaska, on February 5, 1949. At said hearing, the defendant, Alfred J. Peterson, was represented by his attorney, Henry Roden, and the plaintiff was represented by Robert Boochever of his attorneys, Faulkner, Banfield & Boochever. No oral evidence was adduced at said hearing, and the only evidence presented to the Board was that of affidavits and other documentary evidence. From said evidence the Alaska Industrial Board found the facts to be as stated in the Board Decision and Award dated March 31, 1949, and attached hereto as Exhibit A.

VI.

In the finding of facts included in the said decision and award, there is stated on page 2 as follows:

“Applicant was totally disabled from doing work as a laborer, the only type of work he was qualified to do, until January 1, 1948, aggregating 144 days of such temporary disability immediately following August 9, 1947,”

although there was no evidence presented to the Board upon which such a finding of fact could properly be made to the effect that applicant was totally disabled from doing work as a laborer for such a period of time.

VII.

In the finding of facts included in the said decision and award, there is stated on page 2 as follows:

“That applicant is subjected to a permanent partial disability as follows: 50% as compared

to the maximum for a [2] spinal injury, which fairly reflects the percentage of the loss of his earning power,"

although there was no competent evidence presented to the Board upon which such a finding of fact could properly be made to the effect that applicant suffered such a loss of such a percentage of his earning power.

VIII.

Said decision and award was made, although the plaintiff herein objected to the jurisdiction of the Alaska Industrial Board in regard to this case; and although the Board did not place the burden on the said Alfred J. Peterson to show that his alleged injury came within the Act as provided by Section 43, Chapter 3, of the Alaska Compiled Laws Annotated, 1949, and awarded him compensation, although the Alaska Industrial Board had no jurisdiction over this case, and awarded him temporary disability compensation for the period from August 9, 1947, to January 1, 1948, although he failed to prove that he was temporarily disabled for such a period of time, and awarded him permanent partial disability of 50% of the amount payable to him for total and permanent disability, although he failed to prove that he suffered such a degree of permanent partial disability.

IX.

Said decision and award included in addition to the other sums there allowed, an award of \$750.00 as the fee for the said Alfred J. Peterson's attor-

ney, although under the provisions of Section 43, Chapter 3, A.C.L.A. 1949, attorney's fees are not to be granted in addition to other sums awarded, but are to be paid out of the award, and said payments are to acquit the employer for an equal portion of the award, and although such an award as attorney's fees is excessive.

X.

The plaintiff will be substantially damaged unless the payment of the amount required by such award be stayed pending final decision by this Court, because the said Alfred J. Peterson is not a resident of the Territory of Alaska, and inquiries of the plaintiff have failed to reveal that the said Alfred J. Peterson owns any property in the Territory of Alaska which is subject [3] to execution, and therefore plaintiff believes and alleges that the said Alfred J. Peterson owns no such property in the Territory of Alaska, and has no financial resources from which the plaintiff could secure the repayment of any sums paid by it under said award; that plaintiff's refusal to pay said award would subject it to be charged with having committed a misdemeanor, and upon conviction thereof to pay a fine of not less than \$50.00 or more than \$500.00, and that the said Alfred J. Peterson will suffer no injury or damage by being made to await the decision of this Court; that there are attached hereto certificates from the City Clerk of the City of Juneau, Alaska, and the Recorder of the U. S. Commissioner's office at Juneau, Alaska, showing that no property is owned

by the said Alfred J. Peterson in the Juneau Precinct of the Territory of Alaska and said certificates are marked respectively Exhibit B and Exhibit C.

Wherefore plaintiff respectfully appeals to the District Court of the Territory of Alaska for Division Number One, from said decision and award made by the Alaska Industrial Board on March 31, 1949, and prays for an order staying, pending final decision in this proceeding, the payment of the amounts required by said decision and award, and that an interlocutory injunction be granted herein enjoining the defendant Alaska Industrial Board and its members, namely, Henry Benson, Chairman; Gerald Williams, Attorney General of the Territory of Alaska, and Frank Boyle, Auditor of Alaska, as well as the said Alfred J. Peterson from in any manner attempting to enforce, pending final decision in this proceeding, the payment of said amounts by the plaintiff, and that upon final hearing herein said decision and award of the Alaska Industrial Board may be entirely suspended and set aside, and for such other and further relief as may be meet and equitable in the premises.

FAULKNER, BANFIELD &
BOOCHEVER,

Attorneys for Plaintiff.

By R. BOOCHEVER. [4]

United States of America,
Territory of Alaska—ss.

R. Boochever, being first duly sworn on oath according to law, deposes and says: that he is attorney for Alaska Packers Association, a corporation organized under the laws of the State of California; that there are no officers or agents of said corporation at the place where this verification is made; that R. Boochever is authorized to verify the foregoing complaint on behalf of said corporation; that he has read said complaint, knows the contents thereof, and that the facts stated therein are true and correct as he verily believes.

/s/ R. BOOCHEVER.

Subscribed and sworn to before me this 29th day of April, 1949.

[Seal] /s/ LOIS P. ESTEPP,
Deputy Clerk of the District Court, Territory of
Alaska, Division No. 1. [5]

Alaska Industrial Board
Juneau, Alaska

In the matter of the Application of
ALFRED PETERSON,
Applicant
vs.

ALASKA PACKERS ASSOCIATION, a Cor-
poration,
Defendant.

BOARD DECISION AND AWARD

Pursuant to application of the above-named claimant, and hearing before the full Board, at which both parties were represented by counsel, the Board heard evidence and considered the case on the merits, and finds the facts to be as follows:

That during the 1947 fishing season, the applicant was employed by the defendant as a deck hand on one of its "monkey boats" used and operated in connection with its canning operations at Naknek, Alaska.

That on June 10, 1947, while employed as afore-said, applicant was required to carry a sack of coal, weighing two hundred pounds, from the bow to the stern of said boat; that upon depositing said sack of coal, he felt a sharp pain in his back, which pain radiated through his legs. Although applicant was kept on inactive status because of said back injury,

he remained at Naknek until August 9th at the end of canning operations, and was flown to Seattle, Washington. He received full wages from said employer up to and including August 9, 1947. He then received free medical care and hospitalization for his back at the Marine Hospital.

That applicant's daily average wage was \$16.12, of which 65% is \$10.54, his daily rate of temporary disability compensation.

Applicant was totally disabled from doing work as a laborer, the only type of work he was qualified to do, until January 1, 1948, aggregating 144 days of such temporary disability immediately following August 9, 1947.

That applicant is subjected to a permanent partial disability as follows: 50% as compared to the maximum for a spinal injury, which fairly reflects the percentage of his loss of earning power. [6]

That at the time of the accident applicant had one child under 18, dependent upon him.

That at said time defendant had in its employ more than three persons.

From the foregoing findings of fact, the Board makes the following conclusions of law:

That the Board has jurisdiction in this case.

That at the time of the injury, an employer-employee relationship existed between the parties.

That the injury to applicant's back was an accident arising out of and in the course of his said employment.

That said accident caused the disability above specified.

That applicant is entitled to an award for temporary total disability and permanent partial disability on the basis of the above findings and in accordance with the provisions of the Alaska Workmen's Compensation Act, Sec. 43-3-1 ACLA 1949.

It Is Ordered that applicant, Alfred Peterson, is granted and hereby awarded against the defendant the sum of \$1,517.76 as temporary disability compensation, with interest at the rate of 8% per annum from dates that compensation payments thereon were due, until paid, together with \$3,450.00 representing 50% of the amount that would be payable to him for total and permanent disability; together with his attorney's fee in the sum of \$750.00 which fee is hereby fixed at said amount.

Dated at Juneau, Alaska, March 31, 1949.

ALASKA INDUSTRIAL
BOARD.

By /s/ HENRY A. BENSON,
Chairman.

/s/ RALPH J. RIVERS,
Member.

/s/ FRANK A. BOYLE,
Member.

United States of America,
Territory of Alaska—ss.

I Hereby Certify that the foregoing is a full, true and correct copy of the original Board Decision and Award herein, dated March 31, 1949.

/s/ HENRY A. BENSON,
Chairman, Alaska Industrial
Board.

[Endorsed]: Filed April 29, 1949. [7]

In the District Court for the Territory of Alaska
Division Number One, at Juneau
No. 6084-A

ALASKA PACKERS ASSOCIATION,
Plaintiff,
vs.

ALASKA INDUSTRIAL BOARD, and ALFRED
J. PETERSON,
Defendants.

ANSWER OF ALFRED J. PETERSON

Answering plaintiff's complaint on file in this cause, the defendant Alfred J. Peterson denies and alleges as follows, to wit:

1.

Denies the allegations, matters and things set forth in paragraphs six and seven of said complaint

to the effect that no substantial evidence was submitted to the Industrial Board upon which to base the findings in said paragraphs set forth.

2.

Answering paragraph eight of said complaint this defendant denies that said Board lacked jurisdiction to hear and adjudge said cause and denies that he failed to prove that he sustained temporary and permanent disabilities.

3.

Answering paragraph nine of said complaint this answering defendant denies that attorney's fees may not be awarded under said Workmen's Compensation Act and denies that \$750.00 is an excessive fee to allow his attorney for compensation for services rendered herein and to be rendered.

Further answering said complaint, this defendant alleges as follows, to wit:

1.

That during the fishing season of 1947 this defendant was employed by plaintiff, Alaska Packers Association, as a fisherman under the terms and provisions of a contract, commonly known as the "Alaska Fishermen's Bristol Bay Supplementary Agreement"; that at all times herein mentioned this defendant was a member of said Union. [8]

2.

Upon arriving at plaintiff's cannery plant at Naknek, defendant was assigned to serve on the

monkey boat "Rail," which is a wooden vessel of nine net tons, about 45 feet long; said monkey boat was the property of plaintiff and during said season was engaged in towing plaintiff's unpowered fishing boats to the fishing grounds and in returning them, with their catch, to said cannery where said fish were processed and canned; such towing service was rendered solely to plaintiff's fishing boats; that said towing is incidental to the processing and canning of fish and is of purely local character in that said fish are caught and transported within the confines of Bristol Bay and within a few miles of where they are processed and canned; that all fish thus caught, transported and canned is the property of the plaintiff from the time same are caught and said catching and transporting is done at a compensation per fish, agreed upon between plaintiff and its fishermen, including this defendant, at the commencement of the fishing season, each year.

3.

That while employed as aforesaid on the 10th day of July, 1947, this defendant, by accident, suffered an injury in this: that at said time it was his duty to move a heavy sack of coal from one part of said boat to another; in carrying said sack of coal he wrenched his back, causing him to suffer temporary disability up to the time of the hearing of his application for compensation by the Industrial Board, and further on account of said accident he sustained permanent partial disability, causing him the loss of fifty per cent of his earning capacity.

That at said time this defendant was a widower and had one child under eighteen years, dependent upon him.

Wherefore this defendant prays that plaintiff's complaint herein filed be dismissed and the award of the Alaska Industrial Commission in the premises be affirmed and that he recover his costs and disbursements herein.

/s/ HENRY RODEN,

Attorney for Defendant
Peterson. [9]

United States of America,
Territory of Alaska—ss.

Henry Roden, being first duly sworn, on oath deposes and says: I am the attorney for the defendant Alfred J. Peterson and make this verification on his behalf; the same is not made by said defendant person is because he is not now at Juneau, Alaska, where same is made; I have read the foregoing answer, know the contents thereof and that the same is true as I verily believe.

/s/ HENRY RODEN.

Subscribed and sworn to before me this 18th day of June, 1949.

[Seal] /s/ LOIS P. ESTEPP,
Deputy Clerk of District Court, Territory of
Alaska, Division No. 1.

[Endorsed]: Filed June 21, 1949. [10]

In the District Court for the Territory of Alaska
Division Number One at Juneau

No. 6084-A

ALASKA PACKERS ASSOCIATION,

Plaintiff,

vs.

ALASKA INDUSTRIAL BOARD, Composed of
HENRY BENSON, Chairman; GERALD
WILLIAMS, Attorney General of the Ter-
ritory of Alaska, and FRANK BOYLE, Au-
ditor of Alaska, and ALFRED J. PETERSON,

Defendant.

OPINION

The questions presented by this proceeding to set aside the award of the Alaska Industrial Board to the defendant Peterson are:

(1) Whether the case falls within the admiralty jurisdiction, and (2) Whether the findings of the Board that total disability continued from the date of his injury to January 1, 1948, and that the injury resulted in a 50% permanent disability is supported by any substantial evidence.

Plaintiff is engaged in operating a salmon cannery at Naknek, Bristol Bay, Alaska. Peterson was employed by plaintiff on April 28, 1947, at Blaine, Washington, as a deck hand on the vessel Brant, subject to the terms and conditions of the Alaska Fishermen's Union Bristol Bay Supplemental Agreement, and upon the arrival of the vessel at Naknek, was transferred to the vessel Rail, a boat of 9 tons net which was used by the plaintiff for the purpose of towing fishing boats to and from the scows which received the catches, as well as towing the scows themselves. On July 10, while depositing a sack of coal on the galley floor, which he had carried from the bow to the stern of the Rail and which was to be used in the galley stove, Peterson sustained a back strain and discontinued working on July 23rd. On March 31, 1949, the Board awarded him \$1517.76 for temporary disability to January 1, 1949, and \$3450 for 50% permanent disability. [11]

Whether the case falls within the jurisdiction of admiralty over which the judicial power of the United States was extended by Article III, Section 2, of the Constitution, or within the local jurisdiction, is the crucial question.

Under the general maritime law, a seaman is entitled to the remedies of maintenance and cure and to damages for injury or death for failure of the shipowner to furnish a seaworthy vessel or safe and proper appliances. Under the Jones Act, 46 USCA

688, enlarging his rights, the seaman is entitled to damages for injury or death sustained in the course of his employment as a result of negligence. Under the Longshoremen and Harbor Workers Act, 33 USCA 901, et seq., stevedores, longshoremen and casual workers engaged in maritime employment, compensation for whom cannot validly be provided by local law, are likewise entitled to compensation for injuries or death sustained in the course of their employment. Masters and members of crew are excluded from the latter act. For those not falling within these categories, the state may validly provide compensation.

Great difficulty has been encountered, however, in determining the line of demarcation between federal and local authority. The test originally laid down in *Southern Pacific v. Jensen*, 244 U. S. 205, where the Court held that the case of the appellee killed while engaged in unloading a ship as a stevedore, fell within the admiralty jurisdiction is, page 216, that:

“No legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations.”

Despite criticism of the constitutional basis of the *Jensen* decision, the doctrine of that case has never

been repudiated, although its application has been somewhat limited by the development of the "maritime but local" and twilight zone concepts exemplified in *Miller's Indemnity v. Braud*, 270 U. S. 59, and *Davis v. Department of Labor*, 317 U. S. 249. In the light of later decisions, the rule appears to be that stated in *LaCasse v. Great Lakes Engineering Works*, 242 Mich. 454, 219 N. W. 730, in the following language:

"If an injury occurs on navigable waters and in the performance of a maritime contract, it is certainly within the exclusive jurisdiction of admiralty unless (a) the contract is of merely local concern; and (b) its performance has no direct effect upon navigation or commerce; and (c) the application of the state law 'would not necessarily work material prejudice to any characteristic feature of the [12] general maritime law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations.' 4. State Workmen's Compensation Laws . . . are applicable to maritime service on navigable waters, when, and only when, the service is within exceptions (a), (b) and (c) above."

Notwithstanding, the difficulty of determining whether a particular case falls within the federal or local domain has not been obviated. See "A Decade of Admiralty in the Supreme Court of the United States," 36 *California Law Review* 169. And as

late as the Davis case, page 253, 255-6, the Court said:

“This Court has been unable to give any guiding, definite rule to determine the extent of state power in advance of litigation, and has held that the margins of state authority must be determined in view of surrounding circumstances as cases arise. * * * The determination of particular cases, of which there have been a great many, has become extremely difficult. It is fair to say that a number of cases can be cited both in behalf of and in opposition to recovery here.”

* * * “The line separating the scope of the two, being undefined and undefinable with exact precision, marginal employment may, by reason of particular facts, fall on either side.”

* * * “There is, in the light of the cases referred to, clearly a twilight zone in which the employees must have their rights determined case by case, and in which particular facts and circumstances are vital elements.”

It is not disputed that Peterson was a seaman and that he was engaged as such in navigable waters of the United States when injured. Plaintiff contends that these facts alone bring the case within the exclusive jurisdiction of admiralty, while the defendant contends that the case falls within the “maritime but local” exception to the Jensen doctrine, and that, in any event, it falls within the twilight zone concept of the Davis case, *supra*.

The basis of the "Maritime but local" exception appears to be that where the activity is a mere matter of local concern, the application of local law would not work material prejudice to the characteristic features of the general maritime law or interfere with the proper harmony and uniformity of the law in its international and interstate relation. *Washington v. Dawson*, 264 U. S. 219, 227; *Great Lakes v. Kierejewski*, 261 U. S. 479-481; *Employers' Liability Assurance Corporation v. Cook*, 281 U. S. 233. And if the place or character of the employment or the use made of the vessel at the time of the employment is of such an equivocal or indeterminate character that the case could as logically be held to fall on one side of the dividing line between federal and local authority as on the other, recovery could, under the twilight zone concept of the *Davis* case, be had under either federal or local law. [13]

Illustrative of the scope and nature of the "maritime but local" exception, is *Alaska Packers Association v. Marshall*, (9th Cir.) Fed. (2) 279, involving the same locale, but somewhat different facts. There the decedent, with another, operated the usual fishing vessel and delivered his catch to the cannery. He also had shore duty to perform. Here the claimant was a deck hand aboard a tug which was employed in towing fishing vessels to and from the grounds and the scows to and from the cannery. It could be argued, therefore, that in this case, as well as in the *Marshall* case, the dominant activity

was the operation of the cannery and the processing of the fish and that the navigation of the Rail was merely incidental thereto. But in *Olsen v. Alaska Packers Association*, 114 Fed. (2) 364, the same Court refused to extend the scope of the Marshall decision and, hence, it could be said that these two decisions roughly mark the boundaries of the "maritime but local" exception so far as fishing in Bristol Bay is concerned, were it not for *Parker v. Motor Boat Sales*, 314 U. S. 244, and *Davis v. Department of Labor*, 317 U. S. 249. In the former an award under the Longshoremen and Harbor Workers Act, for the death of a janitor and handy man drowned while assisting a fellow employee in demonstrating an outboard motor, was upheld as against the view of the Court of Appeals that the activity in which the deceased was engaged at the time of his death was not only casual but also local in character. Although considerable weight was given to the findings and conclusions of the commissioner who made the award, it appears that the controlling consideration was the circumstance that the accident occurred on navigable waters. In *Davis v. Department of Labor*, 317 U. S. 249, the employer was engaged in dismantling a bridge, in connection with which a tug, a derrick barge and a barge were used. As steel was cut from the bridge, it was lowered to the barge for ultimate towage to a place of storage. The decedent had helped to cut steel from the bridge and was examining the pieces of steel on the barge for the purpose of cutting it further if necessary and, while so en-

gaged, was knocked from the barge and drowned. An award made under the local compensation act was held by the state court to be in conflict with the federal law. The Supreme Court, however, reversed. After commenting on the difficulty encountered in determining the scope of the "maritime but local" exception, the Court rested its decision on the presumption of constitutionality of the state law. Obviously before this presumption could be invoked in the instant case, it would have to appear that the case fell within the marginal area on either side of the [14] dividing line between federal and state authority termed the twilight zone.

Since the twilight zone concept is intended to embrace cases which defy ready classification, it would seem immaterial whether the doubt as to classification arises from the nature of the activity or from the fact that it has both maritime and non-maritime features or from any other cause and that henceforth all cases of doubt would be covered by the twilight zone concept. If this be the correct view, then it would seem that "maritime but local" exception has been swallowed by the twilight zone doctrine and that from now on the exception will serve no useful purpose save that of identifying the factor that gives the case its marginal character. It would, therefore, appear to be unnecessary to determine the limits of the "maritime but local" exception in disposing of the instant case.

Since it is undisputed that claimant was a seaman and that the injury occurred while he was engaged

as such on navigable waters, it is clear that his case is not of the twilight zone character unless the activity in which he was engaged could be said to be one of mere local concern so as to make it doubtful into which domain the case falls. It should be noted that in the Davis case the employment was of an amphibious character and it was undoubtedly its maritime and non-maritime features which suggested the twilight zone concept as a means of escaping the consequences of conflict in attempting a jurisdictional classification of marginal cases. Where a case is of that character it can hardly be said that the assertion of local jurisdiction would work material prejudice to the characteristic features of the general maritime law or interfere with the proper harmony and uniformity of that law in its international or interstate relations. It would, therefore, appear that where, because of the facts and circumstances, it is difficult to determine either whether maritime employment is local in character or whether the employee is a maritime or shore worker, the case would be of the twilight variety.

The question then is whether this is the kind of case that falls within the marginal area resulting from the blending of federal and state jurisdictions. Where, as has been recently observed, the injury is sustained by a seaman on navigable waters, the only possible factor which could bring the case within the twilight zone doctrine is the doubtful character of work in which the vessel was engaged. The Marshall case, *supra*, is not only distinguishable

from the instant [15] case on the facts, but it would appear that it must be deemed to be overruled, at least in part by *Parker v. Motor Boat Sales*, *supra*, and the *Davis* case. In *Gahagan Construction Corporation v. Armao*, (1st Cir.) 165 Fed. (2) 301, 304, the Court pointed out that:

“In no case in the Supreme Court in which the injured person was a seaman performing a seaman’s duties on navigable water has state law been held applicable. Even those members of the Supreme Court who customarily dissented in the application of the *Jensen* rule, concurred in holding state acts inapplicable where the injured person was a seaman covered by the *Jones Act*,”

and concluded, page 305, that, where a seaman is injured on navigable waters, there is no place for the application of the doctrine of local concern. However, the case that would appear to dispose of the question whether the activity in which the *Rail* was engaged in the instant case, was a matter of merely local concern, is that of *London Company v. Industrial Commission*, 279 U. S. 109, where it was held that compensation for the death of a seaman employed in connection with the operation within a radius of 5 miles, in state waters, of a fleet of small fishing boats for hire for deep sea fishing was within the jurisdiction of admiralty. In the course of its opinion, the Court said, pages 123 and 125:

“There was no feature of the business and employment that was not purely maritime. To

hold that a seaman, engaged and injured in an employment purely of admiralty cognizance, could be required to change the nature of conditions of his recovery under a state compensation law, would certainly be prejudicial to the characteristic features of the general maritime law.

“The conclusion sought to be drawn by counsel for the commission from the Rohde and other cases is that workmen’s compensation acts will apply unless their application would interfere with the uniformity of the general maritime law in interstate and foreign commerce, and that there is neither here. But this omits one of the grounds for making an exception—that it shall not be prejudicial to the characteristic features of the maritime law. That is just what it would be here, for here we have a transaction on the navigable waters of the U. S. which in every respect covers all the characteristic features of maritime law and has no other features but those. To apply to such a case a state compensation law would certainly be prejudicial to those features. We must hold, therefore, that it was a violation of the exclusive maritime jurisdiction conferred by the Constitution to apply in this case the California Compensation Act.”

Undoubtedly, one of the essential elements of local jurisdiction is that the employment must be one that has no direct effect on navigation or commerce. It

is well established that the loading and repairing of a ship have a direct effect on commerce and navigation. In this connection, it should be noted that such employment is but one step removed from navigation and commerce. Here, however, the employment does not depend on such a relation. It is of [16] the very essence of navigation and commerce, and, moreover, Peterson was a seaman in the traditional sense. Where the employment is of that character, it is not a matter of mere local concern and the jurisdiction of admiralty is exclusive. If further support were needed, for this conclusion, it may be found in the highly significant fact that in no case in which a seaman, who was also a member of the crew, was injured on navigable waters of the United States, has it been held that local law applies.

It is my opinion, therefore, that the Board erred in concluding that the instant case fell within the local jurisdiction and that the award should be set aside.

GEORGE W. FOLTA,
District Judge. [17]

[Endorsed]: Filed January 25, 1950.

In the District Court for the Territory of Alaska
Division Number One at Juneau

No. 6084-A

ALASKA PACKERS ASSOCIATION,
Plaintiff,
vs.

ALASKA INDUSTRIAL BOARD, Composed of
HENRY BENSON, Chairman; GERALD
WILLIAMS, Attorney General of the Ter-
ritory of Alaska, and FRANK BOYLE, Au-
ditor of Alaska, and ALFRED J. PETERSON,
Defendant.

FINAL JUDGMENT

This matter coming on to be heard before the Court without a jury on December 27, 1949, the plaintiff being represented by R. Boochever of Faulkner, Banfield & Boochever, its attorneys; the defendant, Alaska Industrial Board, being represented by John Dimond, Assistant Attorney General, who did not participate in the proceedings; and the defendant, Alfred J. Peterson, being represented by Henry Roden of his attorneys; arguments having been heard and the Court having filed its written Opinion on January 25, 1950, holding that the Alaska Industrial Board did not have jurisdiction of this claim and that the matter fell within the realm of exclusive admiralty jurisdiction and holding further that the Decision and Award rendered

by the defendant, Alaska Industrial Board, on March 31, 1949, awarding compensation to the defendant, Alfred J. Peterson, in the sum of \$1517.76 for temporary disability to January 1, 1949, and \$3450.00 for 50% permanent disability, should be set aside.

Now, Therefore, It is Hereby Ordered, Adjudged and Decreed that that certain Decision and Award of the Alaska Industrial Board heretofore entered in the above-entitled matter on March 31, 1949, be and the same is hereby set aside, and the Alaska Industrial Board, composed of Henry Benson, Chairman; J. Gerald Williams, Attorney General of the Territory of Alaska, and Frank Boyle, Auditor of Alaska, and Alfred J. Peterson, defendants, be and the same are permanently enjoined from in any manner attempting to enforce said Decision and Award of the Alaska Industrial Board. [18]

Done in open Court this 26th day of January, 1950.

GEORGE W. FOLTA,
District Judge.

Receipt of copy.

[Endorsed]: Filed and entered January 26, 1950.

P. O. Box 2141
Juneau

Alaska Workmen's Compensation Act

Territory of Alaska

APPLICATION FOR ADJUSTMENT
OF CLAIM

Alaska Industrial Board

ALFRED PETERSON,

Applicant,

vs.

ALASKA PACKERS ASSOCIATION,

Defendant.

No.

Applicant's Address: Box 410, Rt. 2, Poulsbo,
Washington.

Defendant's Address: Bell Street Terminal,
Seattle, Washington.

1. Alfred Peterson, age:, while employed as deck hand, on July 10, 1947, at Naknek, Alaska, by Alaska Packers Association, who is subject to the Act, sustained injury arising out of and in the course of said employment as follows: Carrying coal weighing 200 pounds, wrenched and sprained my back resulting in injury to low back and referred pain down right leg ruptured intervertebral disc.

2. Injured left work on July 23, 1947, and disability continued to present.

3. Last payment of indemnity on none; Last medical furnished by employer on about July 29, 1947. Notice of Injury given employer on July 10, 1947.

4. Medical and surgical treatment has been rendered by Marine Hospital, Seattle, Wash., Dr. D. E. McArthur, Dr. Lowell Williams and Dr. Harry Leavitt, all of Seattle, Washington.

5. Employee's wages were \$16.28 per day, working 12 hours per day 6 days per week plus board and room valued at \$30.00 per month. Earnings from 5-1-47 to 8-9-47, \$1,628.10.

6. Total compensation paid to date, none.

7. Injured was divorced, and had two dependents, as follows: Jerome Bryan Peterson, son, age six years, Valborg Peterson, mother.

* * *

9. A question has arisen with respect to the liability of the employer or insurance carrier, or the amount owed and the reason for filing this claim is: to obtain compensation from August 9, 1947, to the present time, together with medical treatment.

Wherefore, it is requested that a time and place be fixed for hearing and notice given, and that an order or award be made granting such relief as the party or parties may be entitled to.

Dated at Seattle, Washington, September 24, 1948.

/s/ ALFRED PETERSON,
Signature of Applicant.

/s/ ROY E. JACKSON,
Agent or Attorney for Applicant if applicant represented.

Note:—Either party to the dispute may apply to the Board for adjustment of any matter in difference. The original application and two copies for the defendant must be mailed to Board at Juneau, Alaska. Due notice will thereafter be given of the time and place of hearing. Either party may be represented in person, by agent or by attorney.

Note:—Time and Place of Hearing Endorsed on Back Hereof. [20]

Territory of Alaska
Alaska Industrial Board
Claim No. AIB 8-3-141

ALFRED J. PETERSON,
Applicant,
vs.

ALASKA PACKERS ASSOCIATION,
Defendant.

NOTICE OF HEARING OF APPLICATION FOR ADJUSTMENT OF CLAIM

You are hereby notified that an application to adjust a claim for compensation (As shown on the

reverse hereof) has been filed in the office of the Alaska Industrial Board at Juneau, Alaska.

You are further notified that said application has been set for hearing at Juneau, Alaska, Monday, November 8, 1948; Room 16, Valentine Building, and that at said time and place the Alaska Industrial Board will proceed to hear and dispose of the said application in the manner prescribed by law.

Dated at Juneau, Alaska, October 19th, 1948.

Witness:

ALASKA INDUSTRIAL
BOARD for

HENRY A. BENSON,
Chairman.

By JOHN P. RUNDALL.

The undersigned certifies that as an employee of the Alaska Industrial Board and the Territorial Department of Labor, he served the foregoing notice on the parties hereinafter mentioned, at the time set opposite their respective names, by depositing a copy of said notice together with a copy of the application mentioned in a sealed envelope in the United States mail, with postage thereon fully prepaid, and addressed to said parties at their last known places of business or residence by registered mail, as follows, to wit:

Name of Parties Served—

Registry Number—

Date—

ALASKA PACKERS ASSN.,

c/o Morrell P. Totten & Co.,

618 Second Avenue,

Seattle 4, Washington,

(2 copies).

10/19/48.

.....

Signature.

JOHN P. RUNDALL.

EXHIBIT I

[See item 4 of the stipulation filed April 6, 1950, in the Court of Appeals set out on page 45 of this printed record.]

State of Washington,
County of King—ss.

I, F. P. Phillips, being first duly sworn on oath, depose and state that I was Superintendent of the South Naknek Cannery, Alaska, of the Alaska Packers Association, for the 1947 summer season and was actually in charge of all personnel, supplies, and operations, and that I have exact knowledge of all supplies, equipment, and floating equip-

ment used in the aforesaid cannery operations. I also hereby state that I personally know Mr. Alfred J. Peterson.

I wish to state that Mr. Alfred J. Peterson was employed by the Alaska Packers Association at the South Naknek Cannery as a Deck Hand during the Season, 1947. Mr. Peterson was first employed in 1947 on April 28th, and sailed as a Deck Hand on the M/V "Brant" on May 1st, from our Semiahmoo Cannery at Blaine, Washington. Captain Phillip Peterson, brother to Alfred J. Peterson, was Captain of the M/V "Brant." According to the official Log of the M/V "Brant," Alfred J. Peterson was transferred to the M/V "Rail" as a Deck Hand on June 19, 1947. To the best of my knowledge, the duties of Alfred J. Peterson were wholly confined to the respective vessels he worked on, and at no time did he perform any work ashore. The sack of coal that Mr. Peterson alleges he was carrying and which he also alleges injured his back was for use in the galley stove. Said sack of coal was lowered by dock employees to the deck of the M/V "Rail" from which landing place Mr. Peterson's duty would be to transport it to the galley.

To all the foregoing I hereby state that this is a true and correct statement to the best of my knowledge.

Date: 1/6/49.

/s/ F. P. PHILLIPS,

Superintendent, Naknek
Station.

Subscribed and sworn to before me at Seattle, Washington, this 6 day of January, 1949.

[Seal] /s/ A. E. McBREEN,
Notary Public in and for the State of Washington,
Residing at Seattle.

Copy Received, Roden. [23]

State of Washington,
County of King—ss.

I, F. P. Phillips, being first duly sworn on oath, depose and state that I was Superintendent of the South Naknek Cannery, Alaska, of the Alaska Packers Association, for the 1947 summer season and was actually in charge of all personnel, supplies, and operations, and that I have exact knowledge of all supplies, equipment, and floating equipment used in the aforesaid cannery operations. I also hereby state that I personally know Mr. Alfred J. Peterson.

I wish to state that Mr. Alfred J. Peterson was a Deck Hand on the M/V "Rail" during the summer fishing season of 1947, employed under the terms and conditions of the 1947, Alaska Fishermen's Union Bristol Bay Supplementary Agreement. The M/V "Rail" was used as a "Monkey Boat" servicing and towing fishing boats of the Alaska Packers Association at the Mouth of the Naknek River. The fishing boats were towed to our stationary marine receiving station named the

“Pearl” which was anchored at the Mouth of the Naknek River. The M/V “Rail,” Official Registration No. 226346, is a wooden vessel of 44.8 Feet in Length, 13.2 Feet in Width, 5.25 Feet in Depth, with a gross tonnage of 20.84, and a net of 9 tons. This vessel contains a 70 H.P. Atlas Diesel engine for motive power. I further wish to state that upon examination of the official Pilot House Log Book of the M/V “Rail,” which is inscribed in the handwriting of the Captain, Birger Nelsen, the only entry on July 10, 1947, is as follows:

3:20 Hooking on to fish boats at NN dock—
towed 9 to (M) Stiff SW Wind.

There is no reference to an injury to a crew member on that date or on any other date. Upon examination of Dr. Pickett’s official Medical Journal for the year 1947, at South Naknek Cannery, there is no mention of, or reference to, on July 10, 1947, or any other day, any injury such as alleged by Mr. Alfred J. Peterson, with the exception of July 9, 1947, when he went to Dr. Pickett at the hospital for head and chest cold, pleurisy across kidney, and the Doctor prescribed as follows:

Expectorant Mix—zl hr., APC; Browns—2
every 3 hrs., Chloroform Liniment. [24]

Date: Dec. 1-48.

/s/ F. P. PHILLIPS,
Superintendent Naknek
Station.

Subscribed and sworn to before me at Seattle,
Washington, this 1 day of December, 1948.

[Seal] /s/ A. E. McBREEN,
Notary Public in and for the State of Washington,
Residing at Seattle.

Copy received, Roden. [25]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Rule 73 (b)

Notice is hereby given that the Alaska Industrial Board and Alfred J. Peterson, defendants above named, hereby appeal to the Circuit Court for the Ninth Circuit from the final judgment entered in this action on January 26, 1950.

J. GERALD WILLIAMS,

HENRY RODEN and

WILLIAM L. PAUL, JR.,

Attorneys for Defendants-
Appellants.

By /s/ WILLIAM L. PAUL, JR.,
Of Counsel.

[Endorsed]: Filed Feb. 21, 1950. [26]

[Title of District Court and Cause.]

COST BOND ON APPEAL OF DEFENDANT
PETERSON

Know All Men by These Presents, That we, Alfred J. Peterson, as principle, and S. M. Kennedy and Mrs. G. R. Kennedy, as sureties, are held and firmly bound unto Alaska Packers Association in the full and just sum of \$250.00, to be paid to the said Alaska Packers Association certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 20th day of February, 1950.

Whereas, lately at a trial in a suit pending in said Court, between Alaska Packers Association and Alaska Industrial Board and Alfred J. Peterson a judgment was rendered against the said Alaska Industrial Board and Alfred J. Peterson and the said Alaska Packers Association having obtained a final judgment thereon on January 26, 1950, and the said defendants having given notice of appeal therefrom to reverse the judgment in said suit.

Now, Therefore, the Condition of the above obligation in such, that if the said Alfred J. Peterson shall prosecute said appeal to effect, and answer all damages and costs if said appeal shall fail, then

the above obligation to be void; else to remain in full force and virtue.

ALFRED J. PETERSON.

By /s/ WILLIAM L. PAUL, JR.,

His attorney in fact.

(L.S.)

/s/ S. M. KENNEDY, (L.S.)

/s/ MRS. G. R. KENNEDY. (L.S.)

[Endorsed]: Filed Mar. 15, 1950. [27]

United States of America,
Territory of Alaska—ss.

Mrs. G. R. Kennedy and S. M. Kennedy being first duly sworn each for himself, and not one for the other, deposes and says: That I am a resident of the Territory of Alaska; that I am one of the sureties who signed and sealed the foregoing bond; that I am not a counselor or attorney at law; that I am not a marshal, deputy marshal, commissioner, clerk of any court, or other officer of any court; that I am worth the sum of \$250.00 over and above all my debts and liabilities and exclusive of property exempt from execution.

/s/ MRS. G. R. KENNEDY,

/s/ S. M. KENNEDY.

Subscribed and sworn to before me this February 20th, 1950, at Juneau, Alaska.

[Seal] /s/ WILLIAM L. PAUL, JR.,
Notary Public for Alaska.

My Commission expires Jan. 19, 1952. [28]

[Title of District Court and Cause.]

STATEMENT OF POINTS

This case does not fall within the jurisdiction of admiralty over which the judicial power of the United States was extended by Article III, Section 2, of the Constitution; but falls within the local jurisdiction.

J. GERALD WILLIAMS,
HENRY RODEN and
WILLIAM L. PAUL, JR.,
Attorneys for appellants.

By /s/ WILLIAM L. PAUL, JR.,
Of Counsel.

Copy received.

[Endorsed]: Filed Feb. 21, 1950. [29]

[Title of District Court and Cause.]

DESIGNATION OF PORTIONS OF RECORD
BY DEFENDANTS

To the Clerk of the Above-Entitled Court:

You are hereby requested to prepare, certify, and transmit to the Clerk of the United States Circuit Court for the Ninth Circuit, with reference to the notice of appeal heretofore filed by defendants-appellants in the above cause, and to include in said transcript of record the following documents, or certified copies thereof, to wit:

1. Complaint filed April 29, 1949, with exhibit of Board Decision and Award only.
2. Answer of Alfred J. Peterson filed June 21, 1949.
3. Opinion of Court filed January 25, 1950.
4. Final Judgment signed January 26, 1950.
5. Exhibits from Board file introduced into evidence: a. Application for adjustment of claim of Alfred J. Peterson with only his affidavit of September 25, 1948; b. Affidavits of F. P. Phillips of December 1, 1948, and of January 6, 1949.
6. Notice of appeal filed February 20, 1950.
7. Defendant Peterson's Cost Bond on Appeal.
8. Appellants' Statement of Points.

9. This designation.

J. GERALD WILLIAMS,
HENRY RODEN and
WILLIAM L. PAUL, JR.,
Appellants Attorneys.

By /s/ WILLIAM L. PAUL, JR.,
Of Counsel.

Copy received.

[Endorsed]: Filed Feb. 21, 1950. [30]

CERTIFICATE

United States of America,
District of Alaska, Division No. 1—ss.

I, J. W. Leivers, Clerk of the District Court for the Territory of Alaska, First Division thereof, do hereby certify that the foregoing and hereto attached 31 pages of typewritten matter, numbered from 1 to 30, both inclusive, constitute a full, true and complete copy, and the whole thereof, of the record prepared in accordance with the praecipe of the Appellant on file herein and made a part hereof, in Cause No. 6084-A, wherein the Alaska Industrial Board et al and Alfred J. Peterson is Defendant-Appellant and Alaska Packers Association, is Plaintiff-Appellee, as the same appears of record and on file in my office; that said record is by virtue of an appeal and Citation issued in this

cause and the return thereof in accordance therewith.

And I further certify that this transcript was prepared by me in my office, and that the cost of preparation, examination and certification amounting to \$19 Dollars has been paid to me by Counsel for appellant.

In Witness Whereof, I have hereunto set my hand and the seal of the above-entitled court this 16th day of March, 1950.

J. W. LEIVERS,
Clerk of District Court.

[Seal] By /s/ P. D. E. McIVER,
Deputy.

[Endorsed]: No. 12512. United States Court of Appeals for the Ninth Circuit. Alaska Industrial Board and Alfred J. Peterson, Appellants, vs. Alaska Packers Association, Appellee. Transcript of Record. Appeal from the District Court for the Territory of Alaska, Division Number One.

Filed March 27, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12512

ALASKA INDUSTRIAL BOARD and ALFRED
PETERSON,

Appellants,

vs.

ALASKA PACKERS ASSOCIATION, a Cor-
poration,

Appellee.

STIPULATION

The parties hereto, by their respective counsel, stipulate that the following enumerated parts of the record in this cause are material to the consideration of this appeal and those parts only should be printed, to wit:

1. Complaint filed April 29, 1949;
2. Opinion of Court, filed January 25, 1950;
3. Final Judgment signed January 26, 1950;
4. Application for Adjustment of Claim of Alfred Peterson and the material portions of his affidavit which it is agreed contain the following facts:

On or about July 10, 1947, Alfred Peterson was employed as a deckhand on the monkey boat "Rail." His duties on this monkey boat were to assist in towing fishing boats and moving scows; that on or about July 10th, while

the vessel was at the Naknek dock in the navigable waters of Bristol Bay, he was carrying a sack of coal weighing two hundred pounds from the bow of the boat to the stern, going through a narrow passage and wrenched and strained his back. He subsequently was admitted to the United States Marine Hospital at Seattle, Washington, on August 11, 1947, and was discharged on September 11, 1947.

5. Affidavits of F. P. Phillips, dated December 1, 1948, and affidavit of F. P. Phillips dated January 6, 1949.

6. Notice of Appeal filed February 20, 1950;

7. Defendant Peterson's Cost Bond on Appeal;

8. Appellant's Statement of Point; and

9. This designation.

10. Clerk's Certificate.

RAY E. JACKSON,

HENRY RODEN,

Attorneys for Appellant
Peterson.

/s/ J. GERALD WILLIAMS,
Attorney General of Alaska.

/s/ R. BOOCHEVER,
Of Attorneys for Appellee.

[Endorsed]: Filed April 6, 1950.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINT RELIED
ON BY APPELLANTS

On this appeal Appellants raise but one point: Whether the Alaska Industrial Board erred when it awarded compensation to Appellant Peterson under the Alaska Workmen's Compensation Act, a local statute, for accidental injuries sustained by him arising out of and in the course of his employment by Appellee as a deckhand on its small power boat used in connection with its cannery operations in Bristol Bay, Alaska.

The District Court for the First Division of the Territory of Alaska reversed the said Board, holding that under the facts here presented, relief could not be granted under the local statute and that the injured workman must resort to admiralty for relief.

RAY E. JACKSON,

HENRY RODEN,

Attorneys for Appellant
Peterson.

/s/ J. GERALD WILLIAMS,

Attorney General, Territory
of Alaska.

Copy received.

[Endorsed]: Filed April 6, 1950.

In The United States
Court of Appeals

For the Ninth Circuit

ALASKA INDUSTRIAL BOARD AND ALFRED J.
PETERSON,

Appellants,

v.

ALASKA PACKERS ASSOCIATION,

Appellee.

BRIEF FOR APPELLANTS

Upon Appeal from the United States District
Court, Territory of Alaska, First Division

HENRY RODEN,
ROY E. JACKSON,
WM. L. PAUL, JR.,

Attorneys for Appellant
Alfred J. Peterson,

J. GERALD WILLIAMS,

Attorney General of Alaska
for Alaska Industrial Board.

FILED

AUG 14 1950

PAUL P. O'BRIEN,
OL

In The United States
Court of Appeals

For the Ninth Circuit

ALASKA INDUSTRIAL BOARD AND ALFRED J.
PETERSON,

Appellants,

v.

ALASKA PACKERS ASSOCIATION,

Appellee.

APPELLANTS' BRIEF

Upon Appeal from the United States District
Court, Territory of Alaska, First Division

J. GERALD WILLIAMS,
Attorney General,

JOHN DIMOND,
*Asst. Attorney General,
for Alaska Industrial Board.*

HENRY RODEN,
ROY E. JACKSON,
WM. L. PAUL, JR.,
for Alfred Peterson.

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STATEMENT OF JURISDICTION

This proceeding is brought under the provisions of the Alaska Workmen's Compensation Act, (Title 43-3-1, et seq. 1949 Compiled Laws of Alaska.)

The appellant Alfred J. Peterson, having sustained accidental injuries arising out of and in the course of his employment by appellee Alaska Packers Association, filed an application for compensation with the Alaska Industrial Board, the authority which administers the Alaska Workmen's Compensation Act. Upon a hearing having been had on said application, the Industrial Board, on March 10, 1949, rendered its decision and awarded Peterson \$1,517.76 as for temporary and \$3,450.00 as for permanent disability compensation. The employer Alaska Packers Association appealed from the Board's decision to the District Court for the First Division of the Territory of Alaska; the District Court reversed the Board and held that the facts presented bring the case within admiralty jurisdiction and that the Alaska Workmen's Compensation Act is inapplicable. From the decision of the District Court the appellant Peterson and the Alaska Industrial Board appeal to this Court.

STATEMENT OF FACTS

The facts in this case are simple and uncontradicted. The appellee Alaska Packers Association operates a salmon canning plant at Naknek in Bristol Bay, Alaska; at the time appellant Peterson sustained the accidental injuries complained of he was in appellee's employ as a deckhand on a small power boat locally known as a "Monkey boat" of nine tons net; this boat

was used by the canning company to service and tow its fishing boats to and from the fishing grounds at the mouth of the Naknek River, in Bristol Bay to its stationary receiving station anchored at the mouth of the said river. On July 10, 1947 while depositing a sack of coal on the galley floor of the "Rail" which Peterson had carried from the bow to the stern of the boat he sustained the accidental injuries complained of.

The monkey boat was a small vessel of nine tons net, called the "Rail."

POINTS PRESENTED AND URGED

On this appeal appellants raise but one point: Did the Alaska Industrial Board err when it awarded compensation to the appellant Peterson pursuant to the Alaska Workmen's Compensation Act, for accidental injuries sustained by him arising out of and in the course of his employment by appellee as a deckhand on its small power boat used by it in connection with its cannery operations in Bristol Bay, Alaska?

ARGUMENT

The appellants rely upon two propositions to sustain their claim that the Alaska Workmen's Compensation Act rather than the general maritime law is applicable to the facts here presented.

These two propositions are:

First: Because the work in which Peterson was engaged at the time he sustained the accidental injuries was of such purely local nature, character and concern that the application of the local statute to it will not work any material prejudice to any characteristic fea-

ture of the general maritime law or interfere with the proper harmony and uniformity of that law in its international or interstate relation;

Second: The place where and the nature of the work performed on the small vessel upon which Peterson was employed at the time he sustained the injuries was of such equivocal nature and character that the case may well be deemed to fall within the purview of either the local or federal statute and that the selection of the forum by Peterson is determinative of this issue.

APPELLANTS' FIRST CONTENTION

As indicated, Peterson was employed as a deckhand in connection with the operation of the Alaska Packers' small power boat, locally known as a "Monkey" boat. It is the work of a monkey boat to tow fishing boats, propelled by oars and sails only, from the shore cannery or moored fish receiving scow to the fishing grounds and return them with their catch of fish, to the receiving scow or cannery where the fish are processed. The work performed by the monkey boat consists exclusively in assisting in the efficient operation of the canning process; it expedites this work and is merely incidental thereto. To bring the fish to the canning plant as quickly as circumstances will permit is the sole purpose of operating such a boat; it was not engaged in any independent effort but used as a mere adjunct to the expeditious execution of the enterprise in which the employer was engaged when the injuries were sustained. There is, in principle, no difference

between the facts here presented and those appearing in the case of:

Alaska Packers Association v. Marshall, 95 Fed. (2) 279,

decided by this Honorable Court in 1938. In that case Marshall and a fellow fisherman, employed by the Alaska Packers Association, encountering heavy weather while fishing in the same waters in which Peterson was operating, were drowned. This Court, speaking by Justice Denman states:

“When the details of the contract of employment are considered the local character of this gathering of the cannery’s raw material is clearly seen as a mere incident in the canning process.”

Hence the local statute became applicable to the case.

A few years after the rendering of the aforesaid decision, the question was again presented for determination by this Court:

Olsen v. Alaska Packers Association, 114 Fed. (2) 364.

However, the facts in the latter case were somewhat different from those in the Marshall case and for this difference, this Court held contrary to what it had done in the Marshall case.

In the Olsen case it appeared that the seaman Olsen was struck by a load of frozen beef being lowered from the ocean steamer “Etolin” to a launch lying in the navigable waters of Bristol Bay, and Olsen sought to recover damages in admiralty as for negligence. The lower court dismissed the libel holding that its allegations did not establish maritime jurisdiction. This Court reversed, holding the allegations sufficient for that purpose and directing to proceed in admiralty. In

the latter case an attempt was made to bring it within the decision in the Marshall case referred to above.

In its opinion the Court distinguishes between the two cases in this language:

"In this case, (the Olsen case) the sailor was injured in loading frozen beef. There is no allegation concerning the ownership of or the purpose to which it was to be put, and there is no showing of any kind that it was to be used in canning. It may well have belonged to and been carried for some third party as a supply for a purpose entirely apart from the Company's salmon canning. There is a general allegation that the work for which the libelant was employed by respondent was to participate in the canning operations and that the employment of the libelant at said cannery was local in character and said employment of libelant (i.e. what he was to participate in) was part of the canning operations."

Speaking about the work the libelant was to "participate in" this Court said:

"The fact that the work which libelant was to 'participate in' was in canning operations, does not negative the fact that at the time he was injured he was employed in other than in canning; loading a cargo of beef from another vessel on a launch in the open sea—35 miles from land for some unknown purpose is a maritime employment and not shown to be anything else."

We venture the assertion that if it had been shown in the Olsen case that the frozen beef which struck him was the property of his employer, the cannery operator; that it had been shipped from the States to Bristol Bay for the sole and exclusive use of the employer to provide his employees, including Olsen, with food; that the employer's employees were customarily required to unload this food and that Olsen was required,

like other employees, to transport it from the ocean carrier to the cannery messhouse on shore, this Court would have held as it did in the Marshall case, namely, that Olsen's employment, though maritime in character, was of a purely local nature, incidental and necessary to the sole business of the cannery operator and therefore controlled by the local statute.

In the case at bar Peterson was working in his employer's small boat; this boat and the work it was required to perform was solely to assist in the expeditious delivery of the raw material used by the cannery; Peterson's work and service was as essential as securing it and his work, together with that of the fishermen and the people actually doing the canning was all incidental to the successful operation of their employer's business. The Peterson situation was very different from that of Olsen; as far as the record shows, there was no connection between the latter's services and his employer's canning operations; for all that appears in that case Olsen was engaged in a venture separate and apart from his employer's cannery work.

It is well settled now that if an injury occurs in navigable waters in the performance of a maritime contract the case falls within the exclusive jurisdiction of admiralty unless, (a) the contract is of mere local concern; (b) its performance has no direct effect upon navigation or commerce; and (c) the application of the local statute would not necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with the proper harmony or

uniformity of that law in its international or interstate relations.

This is the doctrine laid down in :

Southern Pacific Co. v. Jensen, 244 U.S. 205,
and reinforced and expounded in :

Millers' Indemnity Underwriters v. Braud,
275 U.S. 50.

In the latter case the Court considered the Texas Workmen's Compensation Act in its relation to a diver who died in the navigable waters of the Sabine River, because of the lack of sufficient air supply while at work. The insurance carrier claimed that the claim arose out of a maritime tort and that its obligations were fixed by the maritime law. This contention was rejected by the Supreme Court in the following language :

"The record discloses facts sufficient to show a maritime tort to which the general maritime jurisdiction would extend save for the provision of the state compensation act; but the matter is of mere local concern and its regulations by the state will work no material prejudice to any characteristic feature of the general maritime law."

See also :

Grant Smith Porter Co. v. Rhode, 257 U.S.
469.

The latest opinion upon the maritime but local doctrine, appears in the case of :

Maryland Casualty Co. v. Toups, 172 Fed.
(2) 542.

In that case the Circuit Court of Appeals for the 5th Circuit states :

"Toups was both captain and crew of the 46 foot vessel, Relief No. 1, of the Sabine Pilot Asso-

ciation. That Association was engaged in supplying pilots to seagoing vessels that came into and out of the Port of Arthur, Texas, and in furtherance of its business maintained and operated docks and shore installations. Toups was not one of the pilots of large seagoing ships but only of Relief No. 1 with which he took pilots out to ships when they came in and brought them back when their pilotage was ended. In addition to navigating and keeping up the Relief No. 1, Toups at times served as an engineer on the larger vessels. On the day on which he was drowned, he, under order from his employer, was on the Association's small dock and was engaged in making fenders to be used as cushions to protect his vessel against buffeting between the wharves and the big ships when it was required to get between them. While thus employed, from an unknown cause, Toups was precipitated into the water and drowned."

The Maryland Casualty Company had issued workmen's compensation insurance for Sabine Pilots. After investigation the Insurance Company made one insurance payment to the widow of Toups and then concluded that Toups was engaged in maritime employment cognizable only by Federal Statute and stopped making further payments; and sought to set aside an award made by the Industrial Accident Board of Texas under the local Workmen's Compensation Act; it undertook to defend on the ground that the employment and the work of Toups was doing were maritime, that the locality of his death was wholly within navigable waters of the United States.

Upon judgment going against it, the Insurance Company appealed, on the ground (among others not material here) that the Court had no jurisdiction under the Workmen's Compensation Act.

The Appellate Court held:

"In the present case the employment of the deceased was maritime in its nature as the captain and the crew of the Relief No. 1. The work in which he was engaged at the time of his death was likewise maritime. The dock upon which he was working extended out into navigable waters and his death occurred in navigable waters."

The Court then refers to the Jensen and other decisions of the Supreme Court dealing with the maritime but local doctrine and then continues:

"The deceased, no doubt, was a seamen on a vessel engaged in navigation and in aid of navigation whose heirs, in the absence of an applicable State Workmen's Compensation Act, would be remitted to the Jones Act for redress, but since an action under the Jones Act must ground upon negligence, and since in the present case no negligence of the employer can be shown, the heirs would be without remedy under that Act or in Admiralty. Such a result is not imperative unless the invocation of the State Act would *'interfere with the proper harmony or uniformity of that law (admiralty) in its international or interstate relations.* No inharmonious result is here possible. The deceased, at the time of his death was working upon the dock making fenders for the use of his boat. He hauled no interstate or foreign commerce. Neither his vessel nor his work affected the intricate relations that involve the ship, crew, master, owner, cargo, shipper, consignee or responsibility or lack of it under the law of the sea. Neither the activity of the deceased nor the method of compensation agreed upon for his family could have interfered with the proper harmony or uniformity of the law that prevails, and should prevail, in all substantial relations arising out of maritime commerce, whether interstate or international. We conclude that the lower court was not without jurisdiction

to apply the Texas Workmen's Compensation Act to the facts in the present case."

"A State may bring within operation of its Workmen's Compensation laws men employed in handling logs in navigable waters in connection with placing them in booms and conducting them to sawmills."

"It is settled that where the employment, although maritime in character pertain to local matters having only an incidental relation to navigation and commerce, the rights, obligations and liabilities of the parties, as between themselves, may be regulated by local rules which do not materially prejudice the characteristic feature of the general maritime law or interfere with its uniformity."

Eclipse Mill Co. (Sultan) v. Department of Labor 277 U.S. 132.

In *Eldredge v. Weidler*, 81 N.Y.S. (2) 58

The facts were as follows: Claimant's decedent was directed by his employer to go to the assistance of his yacht in view of an oncoming hurricane. The decedent, carrying out these instructions took a rowboat and proceeded to the yacht some short distance offshore. He was drowned. Recovery was had under the local statute. The Court says: "It cannot be gainsaid that his mission was maritime; but the factual situation was so purely local, isolated and transitory that it is difficult to see where, in a real and true sense, it had any substantial connection with navigation or commerce."

Should this Honorable Court find it impossible to agree with the foregoing views, we respectfully request consideration of Appellants' "Second Contention" which is:

APPELLANTS' SECOND CONTENTION

Appellants claim that the nature of the work performed by Peterson and the small vessel and place where it was performed were of such equivocal nature and character as to justify the conclusion that under the decisions of the highest courts of the land, the facts here presented bring the case within what has been designated as the "Twilight Zone", i.e. that it may logically be deemed to be cognizable in either jurisdiction and that the election of the forum by the injured employee determines the jurisdictional issue.

Great difficulty has been experienced in determining whether a particular case falls within the federal or local domain.

Says the Supreme Court of the United States in :

Davis v. Department of Labor, 317 U.S. 249:

"This Court had held that the margin of state authority must be determined in view of surrounding circumstances as cases arise, * * * * the determination of particular cases of which there have been a great many, has become extremely difficult. It is fair to say that a number of cases can be cited both in behalf of and in opposition to recovery here."

"The line separating the scope of the two, being undefined and undefinable with exact precision, marginal employment may, by reason of particular facts, fall on either side."

"There is in the light of the cases referred to, clearly a twilight zone in which the employees must have their rights determined case by case, and in which particular facts and circumstances are vital elements."

The Supreme Judicial Court of Massachusetts has made an attempt to expound the twilight zone doctrine announced in the Davis case in :

Moore's Case, 80 N.E. (2) 478. The Court says:

"The decision in the Davis case lies in its obvious attempt to set up a means of escape from the difficulties in drawing a line between State and Federal authority under the doctrine of the Jensen case. The decision does not overrule the Jensen case but it does create a twilight zone or an area of doubt within which the two acts overlap and the injured workman may recover under either of them. Mr. Justice Frankfurter says that 'theoretic illogic is inevitable so long as the employee is permitted to recover at his choice under either act.'

"We regard the Davis case as intended to be a revolutionary decision deemed necessary to escape an intolerable situation and designed to include within a wide circle of doubt all water cases pertaining both to the land and the sea where a reasonable argument can be made either way even though a careful examination of numerous previous decisions might disclose an apparent weight of authority one way or the other."

In determining whether a state of facts falls on one side or the other a determining factor must be ascertained. True, as stated by our learned District Judge, to date the Supreme Court of the United States has not clearly indicated what that factor may be. The concept of local character may be it; but whether this be so or not, it seems reasonably clear from the interpretation several courts have accorded the Davis decision, that "maritime but local doctrine" continues to play an important part in resolving the difficult question.

Our learned District Judge, in his opinion, lays great stress upon the decision in *Parker v. Motor Boat Sales, Inc.*, 314 U.S. 244, as controlling the situation here. In that case the widow of the drowned employee

commenced her proceedings under the Longshoremen's Act, the employer contending that the local statute was applicable.

In referring to this decision the Supreme Court in the *Davis v. Department of Labor* case states:

"There is, in the light of the case referred to, clearly a twilight zone in which the employees must have their rights determined case by case, and in which particular facts and circumstances are vital elements. That zone includes persons such as the decedent who are, as a matter of actual administration, in fact protected under the state compensation act."

"Faced with this problem we must give great—indeed presumptive—weight to the conclusions of the appropriate federal authorities and to the state statutes themselves Fact findings of the agency, when supported by the evidence, are made final. The conclusion that a case falls within the federal jurisdiction is therefore entitled to great weight and will be rejected only in cases of apparent error. It was under these circumstances that we sustained the Commissioner's findings in *Parker v. Motor Boat Sales, supra*."

"In the instant case we must look solely to state sources for guidance. We find here a state statute which purports to cover these persons, and which indeed does cover them if the doubtful and difficult factual questions to which we have referred are decided on the side of the constitutional power of the state. The problem here is comparable to that in another field of constitutional law in which courts are called upon to determine whether particular state acts unduly burden interstate commerce. In making the factual judgment there, we have relied heavily on the presumption of constitutionality in favor of the state statute."

"The benefit of a presumption is also given in cases of conflict of state or state and territorial

workmen's compensation acts under the Full Faith and Credit Clause "

"Not only does the state act in the instant case appear to cover this employee, aside from the constitutional consideration, but no conflicting process of administration is apparent. The federal authorities have taken no action under the Longshoremen's Act. Under all the circumstances we will rely on the presumption of constitutionality in favor of this state enactment" "The Constitution is no obstacle to the petitioner's recovery." (under the local statute.)

It is respectfully suggested that the judgment herein should be reversed.

Respectfully submitted:

HENRY RODEN,
ROY E. JACKSON,
WM L. PAUL, JR.,

Attorneys for Appellant Peterson,

J. G. WILLIAMS, Attorney General,
for Alaska Industrial Board.

No. 12512

IN THE

United States Court of Appeals

For the Ninth Circuit

ALASKA INDUSTRIAL BOARD and
ALFRED J. PETERSON,

Appellants,

v.

ALASKA PACKERS ASSOCIATION,
Appellee.

Upon Appeal from the District Court for the
Territory of Alaska, First Division

BRIEF FOR APPELLEE

FILED

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PAUL P. O'BRIEN,
CLERK

FAULKNER, BANFIELD & BOOCHEVER,
R. BOOCHEVER,

Juneau, Alaska,

Attorneys for Appellee.

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Appellee.

Upon Appeal from the District Court for the
Territory of Alaska, First Division

BRIEF FOR APPELLEE

STATEMENT OF FACTS.

As mentioned in the brief for appellants, the facts of this case are not in dispute. Since appellants' brief, however, does not include all the facts which appellee considers relevant, a brief statement follows:

Alfred J. Peterson was employed by the Alaska Pack-

ers Association in the State of Washington on April 28, 1947. He was employed as a deck hand aboard the vessel "BRANT" sailing from Blaine, Washington for the waters of Bristol Bay, Alaska. The exact size of the vessel "BRANT" does not appear in the record, but it was a vessel of sufficient size to make the journey from the State of Washington northward and across the Gulf of Alaska to Bristol Bay. On June 19, 1947, Peterson was transferred from the vessel "BRANT" to the vessel "RAIL", again as a deck hand. The vessel "RAIL" was 44.8 feet in length and had a gross tonnage of 20.84 tons and a net tonnage of 9 tons.

On July 10, 1947, while the "RAIL" was anchored in the navigable waters of the United States, Peterson allegedly injured his back while depositing a sack of coal on the galley floor after having carried it from the bow to the stern of the vessel.

Peterson had no duties to perform ashore and performed no work ashore, his duties being confined entirely to the respective vessels on which he worked. Subsequently, Peterson was admitted to the United States Marine Hospital at Seattle, Washington on August 11, 1947, being discharged on September 11, 1947.

The Alaska Industrial Board concluded that it had jurisdiction and entered a Decision and Award which was subsequently reversed by the United States District Court for the Territory of Alaska, Division Number One, for the reason that this case fell within the realm of exclusive maritime jurisdiction and that the Territorial law was inapplicable.

ARGUMENT

I.

ALFRED J. PETERSON'S ALLEGED INJURY WAS SUSTAINED WHILE HE WAS WORKING AS A SEAMAN IN THE TRADITIONAL SENSE ON THE NAVIGABLE WATERS OF THE UNITED STATES, AND THE FACTS DO NOT FALL INTO ANY EXCEPTION TO THE CONSTITUTIONAL PROVISIONS AND FEDERAL ACTS BY WHICH THE FEDERAL GOVERNMENT HAS EXCLUSIVE JURISDICTION IN MARITIME MATTERS.

Article Three, Section Two, of the United States Constitution provides that:

"The judicial power shall extend * * * to all cases of admiralty and maritime jurisdiction."

The case of *Southern Pacific Company v. Jensen*, 244 U.S. 205, 61 L. Ed. 1086, established the fact that States could not make their workmen's compensation laws apply in admiralty matters, holding that the jurisdiction of the United States was exclusive under Article Three, Section Two of the Constitution. In the Jensen case, a stevedore was killed in unloading a vessel in the harbor of New York and his widow proceeded under the New York Workmen's Compensation Act. The Supreme Court ruled that the State had no jurisdiction.

Subsequently, Congress attempted to delegate to the States the right to make their Workmen's Compensation Acts applicable to persons engaged in maritime employment. These attempts were declared unconstitutional by the Supreme Court in the cases of *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 64 L. Ed. 834, and *State of Washington v. W. C. Dawson Co.*, 264 U.S. 219, 68 L. Ed. 646.

Upon the holding that these two acts were unconstitutional, the Federal Government entered this field by the passage of the Longshoremen's and Harbor Workers' Compensation Act, which applies to all maritime employees other than the masters and members of the crew of vessels, and by passage of the Jones Act, giving members of the crew rights in addition to their traditional remedies in regard to unseaworthiness, maintenance and cure. Since the passage of these Acts, the Supreme Court of the United States has consistently held that where an injured person is a seaman performing a seaman's duties on navigable water, state law is inapplicable.

It is true that the Jensen case has been criticized, yet the principal of law there enunciated has been upheld in the most recent Supreme Court cases. This is especially true since the passage of the Longshoremen's and Harbor Workers' Compensation Act and the Jones Act. Thus, in the case of *Parker v. Motor Boat Sales, Inc.*, 314 U.S. 244, 62 S. Ct. 221, 86 L. Ed. 184, Justice Black, speaking for the Court, stated:

"The main impetus for the Longshoremen's and Harbor Workers' Compensation Act was the need to correct a gap made plain by decisions of this Court. We believe that there is only one interpretation of the proviso in Section 3(a) which would accord with the aim of Congress; the field in which a State may not validly provide for compensation must be taken, for the purposes of the Act, as the same field which the Jensen line of decision excluded from State compensation laws. Without affirming or rejecting the constitutional implications of those cases, we accept them as the measure by which Congress intended to mark the scope of the Act they brought into existence."

The Parker case involved an employee of a corporation which sold outboard motors. Although the employee's work was primarily on land, he accompanied another employee in a small boat for the purpose of testing one of the company's motors. He fell from the boat into a river and was drowned. The Supreme Court of the United States held specifically that the State Workmen's Compensation Act was not applicable in the case and that the Longshoremen's and Harbor Workers' Compensation Act did apply.

Similarly, in the case of *Employers' Liability Assurance Corp. v. Cook*, 281 U.S. 237, 50 S. Ct. 308, 74 L. Ed. 823, the entire Court, with the concurrence of liberal Justices Holmes, Brandeis and Stone, ruled that the Texas Workmen's Compensation Act could not apply in the case of an employee injured while in the hold of a vessel assisting in its unloading. This decision was rendered despite the fact that Cook, the employee, normally worked ashore in Texas and was sent on a special assignment to assist in the unloading of the vessel at the time that he was injured. In his concurring opinion in that case, Mr. Justice Stone, stated:

"As the court, in *Northern Coal & Dock Co. v. Strand*, 278 U.S. 142, 73 L.Ed. 232, 49 Sup. Ct. Rep. 88, 28 N.C.C.A. 18, held that one engaged as a stevedore in unloading a ship lying in navigable waters is a seaman within the meaning of the Jones Act (June 5, 1920), 41 Stat. at L. 1007, chap. 250, U.S.C. Title 46, Sec. 688; *International Stevedoring Co. v. Haverty*, 272 U.S. 50, 71 L.Ed. 157, 47 Sup. Ct. Rep. 19, and that by that Act Congress had occupied the field and excluded all State legislation having application within it, I

am content to rest this case on that ground.. See *Nogueira v. New York, N.H. & H.R. Co.* decided this day (281 U.S. 128, ante, 754, 50 Sup. Ct. Rep. 303)."

In the case of *Northern Coal and Dock Co. v. Strand*, 278 U.S. 142, 73 L.Ed. 232, Strand was employed as a stevedore and was killed while working on the vessel assisting in its unloading. The Supreme Court, in an opinion in which all the Justices concurred, held that the State Compensation Act was inapplicable. Again, Mr. Justice Stone concurred, as follows:

"I concur in the result as the majority have placed their conclusions in part, at least, on the grounds that a stevedore while working on a ship in navigable waters is a 'seaman' within the meaning of the Jones Act, (*International Stevedoring Co. v. Haverty*, 272 U.S. 50, 71 L.Ed. 157, 47 Sup. Ct. Rep 19), and that by the Jones Act, Congress has occupied the field and excluded all State legislation having application within it. I am content to rest the case there."

In cases involving employees whose principal duties are ashore and other employees under circumstances where the injury does not occur on navigable waters of the United States, the Supreme Court has found exceptions to the general law excluding the applicability of state compensation statutes. It is expressly to be noted, however, that these exclusions do not apply to cases such as the one at bar, where a seaman is injured in performing maritime duties on the navigable waters of the United States.

As recently as March 1, 1950, this learned Court reiterated the doctrine of *Southern Pacific Company v. Jensen*, supra, in regard to exclusive maritime juris-

diction in its decision in the case of *Alaska Steamship Company v. M. P. Mullaney*, 180 Fed.2d 805, stating:

“The cases dealing with state legislation extending workmen’s compensation laws to seamen (*Southern Pacific Co. v. Jensen*, 244 U.S. 205, 61 L.Ed. 1086; *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 64 L.Ed. 834; *State of Washington v. W. C. Dawson & Co.*, 264 U.S. 219, 68 L.Ed. 646) expound the general policy, both of the Acts of Congress, and of admiralty law independently of statute, to assure uniformity in this field. We recognize that policy, and if we were dealing with a territorial act creating new rights, or altering old rights, as between seaman and his employer, we would necessarily enforce it.”

The exceptions to the exclusive maritime jurisdiction of the United States are brought out in the case of *Davis v. Department of Labor*, 317 U.S. 249, 63 S. Ct. 225, 78 L.Ed. 246, wherein the Supreme Court held that an engineer employed in dismantling a steel bridge connecting two points of the State of Washington, who was injured while on a barge underneath the bridge working on the steel dismantled from the bridge, could recover under the Washington State Compensation Law since its applicability was a matter of purely local concern. It is to be noted that the employee in that case, however, was not a seaman and that his work was not essentially of a maritime nature, although admittedly he was on the barge in navigable water at the time of his injury. The dismantling of a bridge is historically non-maritime work and the fact that the employee continued to work on the steel girders on a barge anchored in the river was not considered as controlling in view of the fact that application of the

State Workmen's Compensation Act would not conflict with the general principles of maritime law. The direct opposite is true in the case of a seaman performing seaman's duties upon navigable water, so that the subject case cannot be held, by any means, to fall within the so-called "twilight zone".

The distinction is well set forth in the recent case of *Gahagan Construction Corp. v. Armao*, 165 F.2d 301, 303, cert. den. 333 U.S. 876. Armao was employed aboard a barge dredging tidelands which were dry a considerable portion of the time. He was injured while so employed, and the question arose as to whether the Massachusetts Workmen's Compensation Act or the Jones Act was applicable. With reference to the "local concern" doctrine, the Court stated:

"The only verbal test given in the cases is that if the employment has no direct relation to navigation and commerce, if state regulation will not prejudice the uniformity of the maritime law, then state laws may be applied and the general maritime jurisdiction abrogated. Millers' Indemnity Underwriters v. Braud, 1926, 270 U.S. 59, 46 S.Ct. 194, 70 L.Ed. 470; Grant Smitth-Porter Ship Co. v. Rohde, 1922 257 U.S. 469, 42 S.Ct. 157, 66 L.Ed. 321, 25 A.L.R. 1008. No more definite test has been laid down, with resulting confusion in the lower federal courts. The constitutional basis of the Jensen case has been severely questioned, but the idea of an exclusive maritime law not subject to state law has never been repudiated by the Supreme Court. As late as 1941, the Court, in Parker v. Motor Boat Sales, 314 U.S. 244, 62 S.Ct. 221, 86 L.Ed. 184, stated that regardless of the constitutional basis of the Jensen and later decisions, Congress in the enactment of the Longshoremen's and Harbor Work-

ers' Compensation Act had accepted them as defining the line between admiralty and state power.

“ * * * The Supreme Court has indicated that within a shadowy area where it is unclear which law should apply, if either the Longshoremen's Act or a state act is applied, the result will be upheld. See *Davis v. Department of Labor*, *supra*. But it should be noted that the overlap is between the federal compensation act and the state acts. It has not been suggested that the Jones Act and the state acts overlap. *In no case in the Supreme Court in which the injured person was a seaman performing a seaman's duties on navigable waters has state law been held applicable.* Even those members of the Supreme Court who customarily dissented in the application of the Jensen rule, concurred in holding state acts inapplicable where the injured person was a seaman covered by the Jones Act. See *Employers' Liability Assurance Corporation v. Cook*, *supra*, 281 U.S. at page 237, 50 S.Ct. 308, 74 L.Ed. 823; *Northern Coal & Dock Co. v. Strand*, *supra*, 278 U.S. at page 147, 49 S.Ct. 88, 73 L.Ed. 232. Summarily stated, their theory was that the Constitution itself did not prohibit state action in the silence of Congress, but after Congress had spoken there could be no state regulation.

“ * * * So we conclude that if the plaintiff was a seaman injured on navigable waters, there is no place for the application of the doctrine of local concern.” (Emphasis ours.)

II.

THE SUPREME COURT OF THE UNITED STATES HAS DECIDED ALL THE ISSUES INVOLVED IN THIS CASE IN ITS DECISION IN *LONDON GUARANTEE & ACCIDENT CO. v. INDUSTRIAL ACCIDENT COMMISSION*, HOLDING THAT THE EXCEPTIONS TO THE EXCLUSIVE MARITIME JURISDICTION OF THE UNITED STATES DO NOT APPLY IN THE

CASE OF A SEAMAN INJURED ON THE NAVIGABLE WATERS OF THE UNITED STATES.

In *London Guarantee & Accident Co. v. Industrial Accident Commission*, 279 U.S. 109, 73 L.Ed. 632, the Supreme Court was confronted with a closely analogous situation to the one at bar. In that case, a man named Brooke was employed by the Morris Pleasure Fishing, Incorporated, as a seaman aboard a small pleasure fishing vessel. The vessels operated out of Santa Monica Bay to the ocean fishing grounds, a distance of three to five miles, and they were of a size ranging from four to fourteen tons registry. A storm arose and Brooke was ordered to proceed to an anchored vessel which had broken from its moorings approximately three-quarters of a mile to a mile from the pier. The small boat capsized and Brooke was drowned.

It is to be noted that in the London Guarantee case, no element of interstate commerce was involved. The entire transaction and the entire duties of Brooke were within a short radius of the Santa Monica pier. In the case at bar, Peterson was employed in the State of Washington and he worked as a deck hand, sailing from that State through the waters of Canada and Alaska and on the high seas. Brooke was injured while on a small skiff, while Peterson was injured aboard the larger motored vessel. Nevertheless, the Supreme Court of the United States reversed the decision of the Supreme Court of California which had held that the injury fell within the purview of the state workmen's compensation act.

In discussing cases involving an exception to the

general rule that the Federal government has exclusive jurisdiction over maritime cases, the Supreme Court used words directly applicable to the Peterson case when it stated:

“Nothing in these cases could apply to the case before us. They may be said to be of an amphibious character. * * * Here it is without dispute that the deceased was a sailor; that his employment and relation to the owner of the vessel were maritime. * * * There was no feature of the business and employment that was not purely maritime. To hold that a seaman engaged and injured in an employment purely of admiralty cognizance could be required to change the nature or conditions of his recovery under a state compensation law would certainly be prejudicial to the characteristic features of the general maritime law.”

The Court went on to state at page 124:

“Another objection to the admiralty jurisdiction here is that the vessel was not engaged in interstate or foreign commerce. It was employed only to run from shore to Santa Monica bay, 5 or 10 miles to the deep-sea fishing place, and then return, and all within the jurisdiction of California. This argument is a complete misconception of what the admiralty jurisdiction is under the Constitution of the United States. Its jurisdiction is not limited to transportation of goods and passengers from one state to another, or from the United States to a foreign country, but depends upon the jurisdiction conferred in article 3, § 2, extending the judicial power of the United States to all cases of admiralty and maritime jurisdiction. * * * The conclusion sought to be drawn by counsel for the Commission from the Rohde and other cases is that workmen's compensation acts will apply unless their application would interfere with the uniformity of the general maritime law in interstate and foreign commerce, and there is neither here. But this omits

one of the grounds for making an exception—that it shall not be prejudicial to the characteristic features of the maritime law. That is just what it would be here, for here we have a transaction on the navigable waters of the United States which in every respect covers all the characteristic features of maritime law and has no other features but those. To apply to such a case a state compensation law would certainly be prejudicial to those features. * * * ”

The subject case does involve the uniformity of the general maritime law in interstate and foreign commerce since Peterson was employed in the State of Washington and served as a deck hand at all times after the vessel “BRANT” left the port at Blaine, Washington until his injury in the waters of Alaska. Even if this were not so, however, the provisions of the London Guarantee case would control since to apply a state workmen’s compensation act in a case such as this, involving injury to a seaman on the navigable waters of the United States, would be prejudicial to the characteristic features of the maritime law.

III.

THE FACTS OF PETERSON’S EMPLOYMENT DO NOT BRING HIS INJURY WITHIN THE PROVINCE OF THE SO-CALLED “TWILIGHT ZONE” REFERRED TO IN THE CASE OF DAVIS v. DEPARTMENT OF LABOR.

The case of *Davis v. Department of Labor*, 317 U.S. 249, 87 L.Ed. 246, holds that in certain borderline cases between Federal and State jurisdiction, the Courts will give great weight to the presumption of the constitutionality of the State Act, as well as the

conclusions of the appropriate Federal authorities. The Court stated:

“There is, in the light of the cases referred to, clearly a twilight zone in which the employees must have their rights determined case by case and in which particular facts and circumstances are vital elements. * * * ”

An examination of cases holding that state compensation acts may validly be applied reveals that in all such cases certain minimum factors must appear. Those factors are as follows: either the injury must have occurred on land or the employment must be predominantly shore work or non-maritime; and the application of the local law must not work material prejudice to any characteristic feature of the general maritime law or interfere with the proper harmony or uniformity of that law in its international or interstate relations. All cases coming within these categories may more readily be contrasted with the one here involved than compared with it.

In the case of *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469, 66 L.Ed. 321, a carpenter was injured while working on an unfinished vessel moored in a river. Since the work aboard the unfinished vessel was a non-maritime contract and since Rohde's general employment had nothing to do with navigation, it was held to be a matter of local concern.

In *Millers' Indemnity Underwriters v. Braud*, 270 U.S. 59, 70 L.Ed. 470, a diver was working 35 feet from the bank of a river on the bottom of the river sawing off timbers from an old abandoned ways when he died of suffocation. The case did not involve a sea-

man and the general maritime laws were not involved.

Alaska Packers Association v. Industrial Accident Commission, 276 U.S. 467, 72 L.Ed. 656, involved a fisherman seaman who had general work to do around a cannery. He was injured after the fishing season while standing on the shore and endeavoring to push a stranded fishing boat into the water. In addition to the fact that the injury occurred on land, it is obvious that the employee's work was of an amphibious nature.

The case of *Sultan Ry. & Timber Co. v. Department of Labor & Industries*, 277 U.S. 135, 72 L.Ed. 820, concerned an employee engaged in assembling saw logs for booms. He was not employed aboard a vessel, and if his employment had any relation to admiralty features, it was only incidental to navigation.

State Industrial Commission v. Nordenholt Corp., 259 U.S. 263, 66 L.Ed. 933, involved an employee injured while on a dock which, under maritime law is regarded as an extension of land, so that the injury could not be regarded as occurring on the navigable waters of the United States.

T. Smith & Son v. Taylor, 276 U.S. 179, 72 L.Ed. 228, involved the same principles as the Nordenholt case, since a longshoreman was struck by a sling while working on a stage resting solely upon a wharf. He was knocked into the water, but since the injury occurred on a projection of land, the state law applied.

In *Ex Parte Rosengrant*, 213 Ala. 202, 104 So. 409, aff'm'd 273 U.S. 664, 71 L. Ed. 829, it was held that a lumber mill employee whose duties were those of checking and grading lumber in the lumber yard, on

railroad cars and also on barges could receive compensation under a state Act when injured while standing on a schooner checking lumber on a barge between the schooner and the dock. The employee did not handle the lumber, and, of course, his work had no direct relation to navigation and was not under a maritime contract.

The case of *U. S. Casualty Co. v. Taylor*, 64 F.2d 521, cert. den. 290 U.S. 639, 78 L.Ed. 555, involved essentially the same situation as the Rohde case, since the employee was working on an unfinished vessel and therefore was engaged in non-maritime employment.

Vancouver SS Co. v. Rice, 288 U.S. 445, 77 L.Ed. 885, again involved an injury occurring on a dock, an extension of land. A similar situation was that of the recent case of *Toups v. Maryland Casualty Co.*, 172 F.2d 542, cer. den. 336 U.S. 967, 98 L.Ed. 1119, where a pilot working on a dock fell into the water. Since the injury occurred on land (the dock being regarded in maritime law as an extension of land), the state Act was applicable.

The case of *Davis v. Dept. of Labor*, supra, involved a structural steel worker engaged in dismantling a drawbridge across a river in the State of Washington. He was standing on a barge beneath the bridge working on the steel dismantled from the bridge when he was injured. The employee was not a seaman, his work was not essentially of a maritime nature since the dismantling of a bridge is historically non-maritime work, and the case falls within the class of cases involving amphibious employment.

Moore's Case, 80 N.E.2d 478, cert. den. 335 U.S. 874, 93 L.Ed. 417, concerned a rigger, generally employed ashore, temporarily working on a boat in drydock. The drydock was fastened to a dock by bolts. Thus the employment was amphibious in nature and it may also be argued that the drydock, being fastened to the dock, was an extension of land, for both of which reasons the case may be regarded as falling within the so-called "twilight zone".

The case of *Baskin v. Industrial Accident Commission*, 201 P.2d 549, reversed 338 U.S. 854, 94 L.Ed. 62, is closely analogous, since it involved an employee, generally employed ashore, working aboard a ship at dock, who was injured while carrying planks from one hold of the ship to another. The amphibious nature of the employment brought the case within the "twilight zone" together with the fact that none of the general characteristics of maritime employment were involved.

It thus may be seen that analysis of Supreme Court decisions holding that state acts may apply reveals that in no such case has the Supreme Court held that a seaman, in the traditional sense, engaged in maritime work on navigable waters, may seek recourse under a state compensation act in addition to his remedies under the Jones Act and those for unseaworthiness, maintenance and cure. The decision in the case of *London Guarantee & Accident Co. v. Industrial Accident Commission* has in no way been overruled or altered by succeeding cases in the Supreme Court of the United States, and it is respectfully submitted that

that decision must be regarded as the law in the case at bar.

In addition to a few of the cases described above, appellants refer to the New York case of *Elridge v. Weidler*, 81 NYS 2nd 58, Brief for Appellants, Page 10. That case is readily distinguishable from the case at bar since it involved an employee whose work was entirely performed ashore. On an isolated occasion he was asked by his employer to take a rowboat and proceed to a waiting ship some distance off shore. He was drowned in following out these instructions. Obviously his employment was predominantly ashore and had nothing to do with the general maritime laws.

The distinction between the Eldridge case and the case at bar requires no amplification, but the decision of the Supreme Court of New Jersey in *Hardt v. Cunningham*, 54 Atlantic 2nd 782, further emphasizes the distinction between amphibious employment such as that of the Eldridge case and maritime employment such as that involved in the subject case. Hardt was the skipper of a barge which was tied up at a New Jersey dock while he went ashore to get certain supplies. He returned to the vessel and proceeded to jump aboard. After landing on the deck of the vessel, he lost his balance, fell into the water and was drowned. Proceeding was instituted under the New Jersey State Workmen's Compensation Law. The Court held:

"As we have seen, jurisdiction in admiralty over torts and injuries of this class depends upon the locality of the injury; and, after all, the ultimate and basic test is whether the injury occurred on the land or on navigable water. Did the sub-

stance of the injury originate on the land or on navigable water in the sense that its consummation somewhere was inevitable? Here, the substance and consummation of the wrong or injury took place on navigable water and not on the land. The decedent 'landed' in an upright position upon the barge after he 'jumped' from the dock. Whether the loss of equilibrium was due to the movement of the vessel upon the water, or from another cause, we have no way of knowing; but, whatever the reason, the mishap was in essence an occurrence upon the water remediable under the maritime law only. There was not, in the 'jump' from the dock to the vessel, the commencement on the land of inevitable injury. The drowning of the decedent was not the result of an accident upon the land, but rather the consequence of his fall from the vessel; and this was just as much a mishap upon the water as if the fall had occurred while the decedent, in boarding the barge, was using a ladder provided for the purpose—even more so, for the fatal fall was from the vessel itself."

The Court goes on to discuss the applicability of the case of *Davis v. Department of Labor* (supra), as follows:

"While this is a borderline case, it is not referable to the marginal area arising from the blending of Federal and State jurisdictions where the individual case suggests characteristics of both and so does not lend itself to absolute classification, and the doctrine of *Davis v. Department of Labor*, 317 U.S. 249, 63 S.Ct. 225, 87 L.Ed. 246, has no pertinency. There, the employee was a structural steel worker whose employer was subject to the State Compensation Act, but who at the same time was engaged in the performance of a contract for the dismantling of an abandoned drawbridge which spanned a navigable river—essentially a land structure. The workman was

employed to aid in the cutting of the steel, both on the bridge itself and in the barge underneath to which the cut steel had been removed for towage to a storage point. The activity was in the main of a local rather than a maritime nature. Compare *Martin v. West*, 222 U.S. 191, 32 S.Ct. 42, 56 L.Ed. 159, 36 L.R.A., N.S., 592; *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469, 42 S.Ct. 157, 66 L.Ed. 321, 25 A.L.R. 1008; *Ford v. Parker*, *supra*; *DeGraw v. Todd Shipyards Co.*, 134 N.J.L. 315, 47 A.2d 338. And in the Davis case, the State Compensation Act, unlike our own, applied to 'all employees and workmen . . . engaged in maritime occupations for whom no right or obligation exists under the maritime laws.' Rem. Rev. Stat. Wash. Sec. 769a. The general presumption of constitutionality in favor of the State statute was invoked to sustain the State action in a case involving 'doubtful and difficult factual questions'."

As in the Hardt case the subject case involves a maritime contract since Peterson was a member of the crew of a seagoing vessel and had no duties to perform ashore. There is no question in the Peterson case but that the alleged injury occurred while Peterson was about his duties as a seaman aboard the ship in the navigable waters of the United States so that the Peterson case falls within the often expressed rule that Federal law is exclusive in the realm of maritime jurisdiction.

Southern Pacific Co. v. Jensen, *supra*;
Knickerbocker Ice Co. v. Stewart, *supra*;
State of Washington v. W. C. Dawson & Co.,
supra;
Clyde SS Co. v. Walker, 244 U.S. 255, 61 L.Ed. 1116;
Northern Coal & Dock Co. v. Strand, *supra*;
Great Lakes Dredge & Dock Co. v. Kierejewski,
 261 U.S. 479, 67 L.Ed. 756;

Gonsalves v. Morse Dry Dock & Repair Co., 266 U.S. 171, 69 L.Ed. 228;
Messel v. Foundation Co., 274 U.S. 427, 71 L. Ed. 1135;
London Guarantee & Accident Co. v. Industrial Accident Comm., supra;
John Baizley Iron Works et al v. Span, 281 U. S. 222, 74 L.Ed. 822;
Employers' Liability Assurance Corp. v. Cook, supra;
Nogueria v. N.Y., N.H. & H.R. Ry. Co., 281 U.S. 128, 74 L.Ed. 754;
Minnie v. Port Huron Terminal Co., 295 U.S. 647, 79 L.Ed. 1631;
Parker v. Motor Boat Sales, supra;
Gahagan Construction Corp. v. Armao, supra.

IV.

CASES DECIDED BY THIS HONORABLE COURT INVOLVING THE SAME LOCALE AS THAT INVOLVED IN THE PETERSON CASE INDICATE THAT THE SUBJECT CASE COMES WITHIN THE REALM OF EXCLUSIVE MARITIME JURISDICTION.

There are two comparatively recent Alaska cases which are similar to the one at bar, one of which in particular appears to be directly in point. The first of the two cases is that of *Alaska Packers Association v. Marshall*, 95 F.2d 279. In that case, "the employees were to work on shore, not only in conditioning their schooners, mending nets and other fishing paraphernalia, but also in the canneries and salteries". The men so employed also, for a short time during their summer's employment, went out for a distance of two or three miles from the cannery at Bristol Bay in small boats for the purpose of fishing for the cannery. Such

a boat overturned, and two employees were drowned. Judge Denman, speaking for the Court, stated:

“When the details of the contract of employment are considered, the local character of this gathering of the cannery’s raw material is clearly seen as a mere incident in the canning process.”, and the Court concluded by holding that the California Compensation Law was applicable since the contract of employment was made in that State. Since, in that case, the fishermen were employed as regular cannery workers in a cannery located in Alaska, and since they had no duties to perform in going to or from Alaska, there is an adequate basis for the Court’s decision. The decision, however, is expressly limited to its exact factual situation by the later case of *Olsen v. Alaska Packers Association*, 114 F.2d 364, which case is on all fours with the case at bar. A sailor was injured in loading frozen beef aboard a vessel from another vessel. The case was stronger on its face than the case at bar in that Olsen apparently performed shore work as well as the work of a sailor. In holding that the matter was one exclusively for maritime jurisdiction, the Court stated:

“The fact that the work which libelant was ‘to participate in’ was to be in canning operations does not negative the fact that at the later time when he was injured he was employed in other work than in canning.”,

and it further stated:

“We are not disposed to press the exclusion of the maritime jurisdiction beyond the area of *Alaska Packers Association v. Marshall*, 9 Cir., 95 F.2d 279, and hold that the libel is within the admiralty and maritime jurisdiction and that

the District Court should proceed with the case as in admiralty."

The fact that the vessel on which Olsen was employed happened to be 35 miles away from its dock at the time that he was injured rather than in navigable water along side the dock, as in the present case, is totally immaterial. No cases distinguish as to maritime jurisdiction on the basis of the distance of the vessel from shore. It is to be noted that in the case of *Gahagan Construction Co. v. Armao*, supra, the barge on which Armao was working was actually out of the water a good portion of the time, and yet the Supreme Court affirmed the decision holding that it was a matter for exclusive maritime jurisdiction. The essential requirement is that the injury occur on navigable water.

The Marshal case may, in a sense, be said to have anticipated the Davis case. Marshal's employment could be regarded as falling within the "twilight zone" since his duties were largely concerned with shore work in the cannery. The Olsen case, holding that the seaman's injury fell within the exclusive realm of maritime jurisdiction, must be regarded as stating the law under the stronger factual situation here involved, since it appeared that Olsen had duties to perform ashore.

Peterson had no duties to perform ashore and performed no duties ashore. He worked as a deck hand aboard a seagoing vessel sailing the ocean from Blaine, Washington, through the waters of Canada, on the high seas and in the waters of Alaska. He was a seaman

in the traditional sense, and entitled to all the rights and recourses historically granted to seamen, as well as those extended to such employees by the Jones Act.

This case is not one involving a hardship to the employee where justice might require a Court to make an exception to established precedents. Peterson is entitled to maintenance and cure, and in addition, if he feels his injury is a result of negligence of his employer, he may take action under the Jones Act. In that connection, it is significant to note that Peterson took advantage of the right that seamen have to be admitted to U. S. Marine Hospitals.

Being a member of the crew entitled to all of the privileges of a seaman, he cannot, in addition, require his employer to be subject to various state workmen's compensation acts.

CONCLUSION

To hold that this is not a case for exclusive maritime jurisdiction would be to make meaningless the provisions of Article 3, Section 2 of the U. S. Constitution; to disregard the intention of Congress in prescribing remedies for seamen, as expressed in the Jones Act; and to do away with the uniformity, so essential in maritime matters. Had Peterson been injured in the waters of the State of Washington, the Washington State compensation act would more logically apply than the Alaska act under the present circumstances, since Peterson was a resident of the State of Washington and was employed there. He would have a

different set of remedies under appellants' theory if he were injured in the waters of Canada, and still a different remedy must be assumed to be applicable if he were injured on the high seas. Such a decision would be in complete disregard of the very factors which those preparing the Constitution of the United States, the Congress and the Supreme Court have deemed so advisable.

It is accordingly respectfully submitted that the judgment of the District Court for the Territory of Alaska, Division Number One, reversing the decision of the Alaska Industrial Board and holding that this case falls within the realm of maritime jurisdiction, be affirmed.

Dated at Juneau, Alaska, this 29th day of August, 1950.

Respectfully,

FAULKNER, BANFIELD & BOOCHEVER
R. BOOCHEVER,

Attorneys for Appellee.

